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LAURA KRUGMAN RAY

Justice John Paul Stevens, now starting his thirty-third full term on the Supreme Court, served as law clerk to Justice Wiley B. Rutledge during the Court's 1947 Term. That experience has informed both elements of Stevens's jurisprudence and aspects of his approach to his institutional role. Like Rutledge, Stevens has written powerful opinions on issues of individual rights, the Establishment Clause, and the reach of executive power in wartime. Stevens has also, like Rutledge, been a frequent author of dissents and concurrences, choosing to express his divergences from the majority rather than to vote in silence. Within his chambers, Stevens has in many ways adopted his own clerkship experience in preference to current models. Unlike the practices of most of his colleagues, Stevens hires fewer clerks, writes his own first drafts, and shares certiorari decisionmaking with his clerks. The links between Stevens and Rutledge suggest that a Supreme Court clerkship of a single year may be a significant influence when a clerk becomes, a generation later, a Supreme Court Justice.

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Clerk and Justice: The Ties That Bind John Paul Stevens and Wiley B. Rutledge

LAURA KRUGMAN RAY *

I. INTRODUCTION

The Supreme Court law clerk, once a shadowy figure who served for modest pay as a Justice's legal factotum, has recently moved into the spotlight. Clerks have featured prominently—and sometimes controversially—as sources for two insider accounts of the Court,¹ as major characters in several legal thrillers,² as the subject of two recent book-length academic studies,³ and as recipients of quarter-million dollar signing bonuses from law firms eager to profit from their aura.⁴ Most dramatically, in the fall of 2005 a former law clerk replaced his Justice, himself a former law clerk, as Chief Justice of the United States. John Roberts appeared most poignantly in his dual role when he stood on the steps of the Court building as pallbearer for Chief Justice William Rehnquist and nominee for his own Supreme Court seat.⁵

Roberts is neither the first law clerk turned Justice nor the only current member of the Court with that history. In fact, he is the fifth former clerk to be appointed to the Court, joining two colleagues, John Paul Stevens and Stephen Breyer, who themselves served as clerks—Stevens to Wiley B. Rutledge and Breyer to Arthur Goldberg.⁶ Nor is this the first time that three Justices, a third of the bench, have been former clerks. From 1975 to 1993, Byron White, Rehnquist, and Stevens shared that distinction, White as a former clerk for Chief Justice Fred Vinson and Rehnquist for

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¹ EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998); BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* (1979).

² See, e.g., PAUL LEVINE, *9 SCORPIONS* (1998); BRAD MELTZER, *THE TENTH JUSTICE* (1997).

³ TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006); ARTEMUS WARD & DAVID K. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006).

⁴ See David Lat, *The Supreme Court's Bonus Babies*, N.Y. TIMES, June 18, 2007, at A19, available at LEXIS, News Library, NYT File ("Most of these [Supreme Court] clerks will join elite private law firms. This is not surprising, since firms entice them with signing bonuses that are expected to reach \$250,000 this year.").

⁵ See Linda Greenhouse, *Bush and First Lady Visit Rehnquist's Coffin at Court*, N.Y. TIMES, Sept. 7, 2005, at A14, available at LEXIS, News Library, NYT File. For the accompanying photograph, see JEFFREY TOOBIN, *THE NINE* (2007) (facing 184).

⁶ See PEPPERS, *supra* note 3, at 130, 167.

Associate Justice Robert Jackson.⁷ Yet Roberts does hold a noteworthy distinction as the first third-generation law clerk named to the Court, the third link in a chain of conservative Justices stretching back to the polarized Roosevelt Court.

This record of clerks turned Justices is scarcely surprising. A Supreme Court clerkship has long been a sought after position for high achieving law school graduates. Even in the days when clerks had significantly more limited duties, it was a valuable credential in launching an ambitious legal career—the kind that might possibly lead back to the high court. Many former clerks remain close to their Justices and interested in the work of the institution, even if they do not go on, as Roberts did, to build careers as advocates before the Court. The clerkship has become a badge of honor, always included in law firm and law school faculty biographies, as well as a convenient shorthand for academic success and professional distinction. It seems a safe prediction that Roberts will not be the last former clerk to join the Court, or even the last former clerk to take the seat of his or her Justice.

The question that to date has sparked the most interest in the relationship between Justices and clerks is the degree of influence that the latter may have on the former. Over fifty years ago, William Rehnquist, fresh from his own clerkship on the Supreme Court, wrote a piece for *U.S. News & World Report* suggesting that the Court's predominantly left-leaning clerks of his generation might well be swaying their Justices' votes in the certiorari process.⁸ Forty years later, another former clerk, Edward Lazarus, stirred controversy by claiming that some Justices on the Court were particularly vulnerable to jurisprudential manipulation by their clerks.⁹ The return of former clerks to the Court has, however, inverted that question to raise a more challenging variation: the influence that a clerkship may have on the judicial performance of a Justice.

The example of Justice Rutledge and Justice Stevens offers a particularly intriguing field for study. Although the pairing is in some respects imbalanced—Rutledge served for only six full terms before his untimely death, while Stevens is currently serving his thirty-third full

⁷ See *id.* at 125, 138.

⁸ William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP., Dec. 13, 1957, 74–75. After rejecting the likelihood of clerk influence on the Justices' opinions, Rehnquist argues that “no such clean bill of health is possible” for the cert process, where Justices are more reliant on clerks' research. *Id.* at 75. He finds it “fair to say that the political cast of the clerks as a group was to the ‘left’ of either the nation or the Court,” what he describes as “the political philosophy now espoused by the Court under Chief Justice Warren.” *Id.* Based on his own experience as a clerk, he concludes that “[t]here is the possibility of the bias of clerks affecting the Court's certiorari work.” *Id.*

⁹ Lazarus asserts that “[t]he temptation” for manipulation by clerks “was (and remains) especially great at the political center of the Court, in the chambers of Justices O'Connor and Kennedy, both of whom are susceptible to clerks' arguments and delegate to them almost all the opinion drafting and doctrine crunching.” LAZARUS, *supra* note 1, at 274.

term—it nonetheless reveals the ways in which a clerkship of a single year may affect not only the future jurisprudence but also the institutional behavior of a clerk turned Justice.

II. WILEY B. RUTLEDGE

A. *The Man*

Wiley Blount Rutledge was Franklin Roosevelt's eighth and final appointment to the Supreme Court. From the moment he joined the Court in February 1943, Rutledge became a reliable vote for positions supporting individual constitutional rights, particularly those protected by the First Amendment and the Due Process Clause. When Rutledge died of a massive stroke only six years later, his seat was filled by Sherman Minton, one of the Court's least illustrious Justices and no supporter of expansive constitutional readings. Yet Rutledge has remained, until recently, an overlooked figure; it was not until 2004 that the first serious biography appeared. The account of that book's genesis by its author, John Ferren, suggests the paucity of scholarship about Rutledge. Seeking a subject for "a complete biography of someone in our national political life," Ferren settled on Rutledge as a promising choice in part because "it was clear . . . [that] the [J]ustice and his service on the Supreme Court during the 1940s had not received comprehensive study."¹⁰ Aside from the Ferren biography, the most valuable assessments of Rutledge are contained in two essays by former law clerks, Louis Pollak¹¹ and, not surprisingly, John Paul Stevens.¹²

Rutledge's personal history reveals a somewhat bumpy and unconventional road to the Court.¹³ He was born in 1894 in Kentucky, the son of a Baptist minister and a mother who died when he was nine of tuberculosis, a disease he too would later contract. After majoring in Latin and Greek at a small Tennessee college, he transferred to the University of Wisconsin for his senior year, switching his major to chemistry in the hope of improving his employment prospects. Apparently no scientist—his

¹⁰ JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE* 543 (2004). Ferren consulted Harvard professor Andrew Kaufman, author of a highly regarded biography of Justice Cardozo, and Dr. David Wigdor of the Library of Congress's Manuscript Division. *Id.* The only earlier biography, *Justice Rutledge and the Bright Constellation*, published in 1965 by Fowler Harper, a colleague of his subject at the University of Iowa Law School, did not attempt the detailed analytic examination of Rutledge's life and jurisprudence that Ferren's book provides.

¹¹ Louis H. Pollak, *Wiley Blount Rutledge: Profile of a Judge*, in *SIX JUSTICES ON CIVIL RIGHTS* 177 (Ronald D. Rotunda ed., 1983).

¹² John Paul Stevens, *Mr. Justice Rutledge*, in *MR. JUSTICE* 177 (Allison Dunham & Philip B. Kurland eds., 1956).

¹³ The following account draws heavily on Ferren's biography of Justice Rutledge. See FERREN, *supra* note 10.

chemistry grades were poor enough to require a summer “makeup course” for graduation—Rutledge changed his career plans once again.¹⁴ He enrolled in law school at Indiana University, at the same time teaching high school to pay his expenses. The double burden proved untenable; Rutledge dropped out of law school and was teaching high school when he was diagnosed with tuberculosis, requiring a prolonged stay at a North Carolina sanatorium. When sufficiently recovered, Rutledge returned to teaching, this time in the more salubrious climate of Albuquerque, before moving on to Boulder, Colorado, where he successfully balanced a teaching job with law school, graduating in 1922. After a brief stint of law practice, he joined the University of Colorado law school faculty in 1924, teaching a broad range of courses until he was invited to join the faculty of Washington University in St. Louis two years later. At Washington University he taught corporate law courses before becoming dean in 1931 and then accepting the deanship of the University of Iowa College of Law four years later. Although an academic like fellow Roosevelt appointees Felix Frankfurter and William O. Douglas, Rutledge did not match their record of distinguished scholarship.¹⁵ When Roosevelt named him to the Supreme Court in 1943, following four years on the United States Court of Appeals for the District of Columbia Circuit, the President seemed more impressed by the political value of Rutledge’s assorted residences west of the Mississippi River: “Wiley,” Roosevelt reportedly said, “you have a lot of geography.”¹⁶

If Rutledge was not a distinguished scholar, he had other virtues that contributed to, and sometimes conflicted with, his work on the Court. As a professor and dean, he was always available to his students not only to discuss course-related matters but also to provide advice and assistance for

¹⁴ *Id.* at 30.

¹⁵ According to Ferren, “Wiley Rutledge was not a productive scholar during his academic life. His duties as dean, his love of people more than the library, and his difficulty in writing analytic prose all kept him from legal writing. Of these, probably the last was the main reason he wrote so little . . .” *Id.* at 98. Jeffrey D. Hockett suggests another reason. He notes that Rutledge suffers from comparison with some of his celebrated fellow Justices, Black, Douglas, Frankfurter, and Jackson: “The lack of scholarly interest in Rutledge also stems from the fact that he had neither the ‘intellectual firepower’ of these men nor their felicity of expression.” Jeffrey D. Hockett, Book Review, 47 AM. J. LEGAL HIST. 305, 305 (2005) (reviewing JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF WILEY RUTLEDGE* (2004)) (citation omitted). Willard Wirtz, who was recruited by Rutledge as a junior faculty member at Iowa, has summarized Rutledge’s limited scholarship and attributed it to the time he chose to spend with his students:

No treatise or casebook bears the Rutledge name. His contributions to the law reviews were less than those of most of his colleagues. There are only two “leading articles” and one unusually illuminating book review to bear witness to what his contributions to record scholarship would have been if he had, as teacher, chosen differently. So it was not as a scholar, measured by writings, that Wiley Rutledge achieved his academic stature.

W. Willard Wirtz, *Teacher of Men*, 25 IND. L.J. 444, 445 (1950).

¹⁶ FERREN, *supra* note 10, at 219 (citation omitted).

more personal concerns.¹⁷ He was also an active participant in the larger community; in both St. Louis and Iowa City he was a member of civic and professional organizations, a frequent public speaker, and an activist supporting such controversial causes as a proposed constitutional amendment regulating child labor and Roosevelt's Court-packing plan.¹⁸ A man with a wide circle of friends, at the Court he continued to welcome visitors to his chambers for lengthy conversations, often delaying the start of his opinion work.¹⁹ And opinion writing did not come easily to him; even after four years on the circuit court, he described the process to another judge as "extremely hard."²⁰ Unlike his colleagues, who generally addressed only the issues pertinent to their resolution of a case, Rutledge felt an obligation to assure counsel that he had considered all the arguments they raised. As he told one of his law clerks, "however foolish or trivial his arguments, I want them to know that I heard him."²¹ Rutledge's biographer reports, based on interviews with the Justice's law clerks, that Rutledge not only wrote his own opinions but did his own background research as well. Justice Stevens recalled Rutledge "regularly taking home 'chunks of the record'" to review and "in a First Amendment obscenity case Rutledge had not relied only on the cert petition, clerk's memorandum, and briefs. 'He read the book.'"²²

The consequence of this diligence was sometimes opinions more admired for their thoroughness than for their effectiveness. Ferren describes a typical Rutledge opinion as having "the features not of a narrowly focused, accelerating argument toward an irresistible conclusion, but of a law review article that painstakingly explored the alternatives before eventually yielding a result."²³ When assigning cases, Ferren suggests, senior members of the Court (principally Chief Justices Stone and Vinson and Justice Black) had reason to pass over Rutledge out of concern that his opinion would be excessively long, slow in coming, and

¹⁷ See *id.* at 111–13 ("Dean Rutledge did not limit his interactions with students outside class to problem solving. He was easily accessible for any reason . . .").

¹⁸ *Id.* at 68, 72–74, 128–30.

¹⁹ See *id.* at 230–31 (describing a typical work day for Rutledge). John Frank has suggested the toll taken on Rutledge by his many friends:

Almost every mature law professor in the United States called him friend. After the war, an army of these friends kept up a constant flow of visits to the Justice at the Court. I plead my share of guilt. There were no appointments required, and there were no time limitations; Rutledge's days were nibbled away in little bites of auld lang syne.

John P. Frank, Book Review, 18 STAN. L. REV. 274, 277 (1965) (reviewing FOWLER V. HARPER, JUSTICE RUTLEDGE AND THE BRIGHT CONSTELLATION (1965)).

²⁰ FERREN, *supra* note 10, at 230 (citation omitted).

²¹ *Id.* According to Ferren, "Rutledge was fond of saying that a losing litigant never complained that the opinion was too long." *Id.*

²² *Id.* (citation omitted). See also PEPPERS, *supra* note 3, at 138 (describing Rutledge and Black as Justices who "reviewed the original records and briefs . . . closely").

²³ FERREN, *supra* note 10, at 200.

broader in scope than other like-minded Justices were prepared to accept.²⁴ Even Rutledge's strong admirers had reservations about his work. Attorney General Francis Biddle, reviewing Court candidates for President Roosevelt, found Rutledge "the most promising" in the field but noted that "[h]e was apt to be long-winded" in his circuit court opinions.²⁵ Even a law clerk from his final Court Term, federal judge Louis H. Pollak, in an appreciative essay about Rutledge's civil rights jurisprudence, described him as "rarely eloquent" and some of his opinions as "too long and discursive for maximum impact."²⁶

Rutledge was, it appears, a victim of his virtues. Sociable by nature and a loyal friend, he increased the burden of his Court work by spending hours with visitors that might otherwise have speeded up his judicial labors. A conscientious and meticulous drafter, he tended to blunt the force of his opinions with copious detail and extraneous issues. These work habits may also have contributed to his early death, at the age of fifty-five, after only six Terms on the Court.²⁷ If Rutledge was not ideally suited by temperament to the particular constraints of the Court—he reportedly talked at times of returning to academia²⁸—he nonetheless worked hard to provide a strong judicial voice for his liberal views, particularly in First Amendment cases. Most of these views were contained in concurrences and dissents, sometimes joined by others and sometimes solitary, that staked out independent and even controversial positions on important constitutional issues.

The diverse strains at work in Rutledge—his personal warmth, his concern for the needs and the rights of individuals, his punishing commitment to the duties of an uncongenial job, and his sometimes bold assertions of an independent jurisprudence—suggest a complicated

²⁴ *Id.* at 347. According to Frank, Rutledge was "keenly aware" of his slow pace: "'I'm just not as fast as Black or Douglas,' he used to say with affectionate envy." Frank, *supra* note 19, at 277.

²⁵ FOWLER V. HARPER, JUSTICE RUTLEDGE AND THE BRIGHT CONSTELLATION 24 (1965).

²⁶ Pollak, *supra* note 11, at 191–92. Frank too noted Rutledge's "one true serious limitation, prolixity. Rutledge could not dispose of a point briefly; it was an emotional and mental impossibility." Frank, *supra* note 19, at 277.

²⁷ According to his friend, the writer Irving Brant, Rutledge's "nature compelled him to give more of himself in mind and spirit than the body could continue to replace." Irving Brant, *Mr. Justice Rutledge—The Man*, 25 IND. L.J. 424, 425 (1950). Brant concludes that Rutledge's "family and Court associates realized that he was driving himself beyond his powers and begged him to drop the nonmandatory work. But the mandate was within himself. He could not give less than all, so [he] gave his life." *Id.* at 443. More specifically, two of his former law clerks report that, when preparing for the Court's conference, "[i]t was his custom—until forbidden to do so by his doctor—to sit with his law clerk, into the following morning if necessary, and go over in detail the cases to be decided and the petitions for certiorari." Victor Brudney & Richard F. Wolfson, *Mr. Justice Rutledge—Law Clerks' Reflections*, 25 IND. L.J. 455, 456 (1950).

²⁸ According to Brudney and Wolfson, Rutledge was a sociable man who suffered from "that isolation which membership on the Court tends to impose upon Justices." Brudney & Wolfson, *supra* note 27, at 458. They describe him as "[f]ully cognizant of his isolation, indeed occasionally expressing a desire to return to academic life." *Id.* at 460.

relationship to his work on the Court. It is intriguing to consider how such a Justice's performance of his judicial role might have influenced a law clerk who observed Rutledge at close range for a year and found himself, a generation later, facing the same professional challenges.

B. *The Opinions: Law and Consequences*

Although none of the opinions on which Rutledge's legal reputation largely rests was written during the 1947 Term of Stevens's clerkship, Stevens would certainly have been aware of them as expressions of his Justice's foundational jurisprudence, both when they were written and in later years, despite Rutledge's low public profile. Stevens was a law student at Northwestern University from 1945 to 1947 and the co-editor-in-chief of its *Law Review* in his final year, a period during which several of those opinions appeared and during which he might be expected to be particularly attuned to the work of the Court.²⁹ Further, as Louis Pollak has argued, "the full force" of some of Rutledge's positions, particularly those on First Amendment issues, "was not recognized until years after his death."³⁰ Justice Douglas, for example, noted his reliance on "the durable First Amendment philosophy" of Rutledge's dissent in *Everson v. Board of Education* when, in 1962, Douglas joined the majority in *Engel v. Vitale*, the controversial case striking down the New York Regents' school prayer as unconstitutional.³¹

By the time Stevens joined the Supreme Court in 1975, Rutledge's academic reputation was not strong; there is very little scholarship on his work to be found following a joint symposium in his honor published by the Iowa and Indiana law reviews shortly after his death in 1949. The few exceptions tend to reflect personal connections between author and subject: a 1965 biography by Fowler Harper, a colleague of Rutledge's at Iowa, and the essays, previously noted, by Stevens and Pollak.³² Stevens's own essay is ample proof of his knowledge of and respect for the canon of Rutledge opinions.

Those writing about Rutledge, including those who knew him personally, tend to sound two clear and related themes. The first is that he

²⁹ See John Paul Stevens, *A Personal History of the Law Review*, 100 NW. U. L. REV. 25, 25–26 (2006).

³⁰ Pollak, *supra* note 11, at 191.

³¹ *Engel v. Vitale*, 370 U.S. 421, 443–44 (1962) (Douglas, J., concurring) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 53–54 (1947) (Rutledge, J., dissenting)). Pollak also notes that, a year earlier, Justice Black had acknowledged that the force of Rutledge's dissent in an exclusionary rule case had "become compelling" in the intervening years and thus helped to shape his decisive fifth vote applying the rule to state courts in *Mapp v. Ohio*, 367 U.S. 643, 662 (1961) (Black, J., concurring). For a complete account of this episode, see Pollak, *supra* note 11 at 197–200.

³² See HARPER, *supra* note 25; Pollak, *supra* note 11; Stevens, *supra* note 12. Pollak also wrote an earlier piece on Rutledge. See Louis H. Pollak, *W.B.R.: Some Reflections*, 71 YALE L.J. 1451 (1962).

thought about the law in terms of its effects on people, both the specific parties before the Court and the wider population. The second theme is that Rutledge viewed his role as doing justice rather than following precedent; in Pollak's words, he was quite simply "not doctrinaire,"³³ preferring results to doctrinal consistency. The two themes are closely tied. The dean who saw part of his job as finding ways to help his students became the Justice who saw his job as reaching the just outcome in the cases that came before him. Irving Brant recounts Rutledge's description of his jurisprudential attitude:

Justice Rutledge did not even render lip service to that concept of the law (usually stated more alluringly) which treats it as an absolute, to be applied in every case without regard to consequences, even though it means cutting a baby in two. A large element in his method, he said, was to determine where justice lay and then look for valid principles of law to sustain it. If judge-made law sustained injustice he would search for ways to change it.³⁴

Rutledge was not uneasy about a legal methodology unmoored from the constraints of doctrine and precedent. In the introduction to his series of lectures on the Commerce Clause, *A Declaration of Legal Faith*, Rutledge sketched in broad terms his approach to the philosophical questions underlying the law and legal institutions:

It is a matter of faith. And faith is more felt than thought. From a universe compounded of order and chance, of fate and free will, of past and future, of good and evil, of all the irreconcilables going to make up the vast interacting stuff of life, each for himself must select what is valid and true to live by and die by. However guided by reason, the choice at the last must be intuitive, must be felt, or it cannot be complete. So also must nations and societies choose and live by a faith. Else they die.³⁵

In one of his First Amendment opinions, Rutledge made a similar point about the complementary roles of intuition and reason in legal decisionmaking:

Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a

³³ Pollak, *supra* note 11, at 202.

³⁴ Brant, *supra* note 27, at 439.

³⁵ WILEY RUTLEDGE, *A DECLARATION OF LEGAL FAITH* 4–5 (1947).

thousand ways. They cannot be altogether parted in law more than in life.³⁶

As a template for a future Justice, Rutledge's approach, so exhausting in practice for himself, was also potentially liberating in its pragmatic pursuit of fairness and its resistance to the claims of reasoned consensus. If each decisionmaker was entitled to pursue an individual sense of fairness, then a Justice was under no institutional constraint to reach accommodation with the views of colleagues. At the same time, Rutledge felt an obligation to root his decisions in the particular context of each case, scrutinizing both record and briefs and then taking care to signal counsel in his opinion that he had done his homework. The result of these diverse strains was often a long opinion that contained both highly abstract formulations and carefully documented factual details.

Two of Rutledge's best known First Amendment opinions, one for the Court and the other in dissent, illustrate the internal tensions of his methodology. *Thomas v. Collins*, decided in 1945, rejected the application of a Texas statute requiring anyone soliciting new members for a labor union to first secure an organizer's card from the state.³⁷ The appellant, a vice president of the Congress of Industrial Organizations, had been held in contempt for violating a temporary restraining order that prohibited him from addressing a mass meeting sponsored by a local union without first obtaining such a card; at the meeting Thomas spoke generally of the advantages of union membership and then invited one nonunion attendee to join.³⁸ Writing for the Court, Rutledge held that the statute as applied to Thomas violated First Amendment rights of speech and assembly.³⁹ Rutledge's chief argument focused on the problem of distinguishing Thomas's general statements, which Texas conceded were protected speech, from his specific invitation. This distinction, Rutledge found, was "the nub of the case"⁴⁰ because it imposed an untenable burden on the speaker: "Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."⁴¹ In the language of later Warren Court opinions, the requirement has a potentially chilling effect on speakers, deterring them from fully exercising their free speech rights (a point not strictly applicable to Thomas, who was in fact undeterred and suffered the consequences).⁴²

³⁶ *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

³⁷ *Thomas v. Collins*, 323 U.S. 516, 532 (1945).

³⁸ *Id.* at 522–23.

³⁹ *Id.* at 534–35.

⁴⁰ *Id.* at 535.

⁴¹ *Id.*

⁴² See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) ("The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the

This First Amendment insight is embedded in an opinion that covers twenty-six pages and contains twenty-four footnotes. Rutledge is at pains to set forth all of the arguments raised by counsel before observing that “we put aside the broader contentions both parties have made and confine our decision to the narrow question whether the application made of § 5 in this case contravenes the First Amendment.”⁴³ His final and longest footnote, which covers two half-pages in U.S. Reports, describes in detail the procedures established by the Texas Secretary of State for implementation of Section 5, the number of applications filed under those procedures, and their resolution.⁴⁴ The opinion is, as Pollak notes, “too long and discursive for maximum impact.”⁴⁵ At the same time, it also contains powerful language that frames the central issue at its most abstract and significant level:

The case confronts us again with the duty our system places on this Court to say where the individual’s freedom ends and the State’s power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions.⁴⁶

In two sentences, the previously diffuse opinion pinpoints two issues of grave constitutional import: the scope of the Court’s power to review legislative statutes touching on constitutional rights, and the question of whether First Amendment protections occupy a preferred position among the individual rights safeguarded by the Constitution. Rutledge’s “perhaps” is neutralized by the third sentence’s direct statement, which asserts without qualification that the “priority” of the First Amendment assigns the Court an enhanced role to play in preventing “dubious intrusions” of speech rights. *Thomas* thus combines both aspects of Rutledge’s style: the rival tendencies to base his opinions on constitutional intuitions and to provide copious factual detail. It is hard not to wish that the opinion had been edited to limit the latter and elaborate the former.

Rutledge’s dissent in *Everson v. Board of Education* displays a variant of the tension between broad constitutional principle and abundant supporting detail. The Court’s opinion, written by Justice Black, upheld a New Jersey statute authorizing public payment for transportation of

prospects of its success or failure.”) (citations omitted).

⁴³ *Thomas v. Collins*, 323 U.S. 516, 532–33 (1945).

⁴⁴ *Id.* at 541–42 n.24.

⁴⁵ Pollak, *supra* note 11, at 192.

⁴⁶ *Thomas*, 323 U.S. at 529–30 (citations omitted).

children to Catholic schools.⁴⁷ Although Black, following Thomas Jefferson, reads the Establishment Clause “to erect ‘a wall of separation between Church and State’”⁴⁸ that “must be kept high and impregnable,” he finds that the state’s program facilitating an educational goal has not “breached” that wall.⁴⁹

In his dissent, Rutledge also embraces the wall of separation but insists that the majority has itself created a breach by upholding the statute. Rutledge opens his opinion with an extended quotation from Jefferson’s “Bill for Establishing Religious Freedom,” which asserted that “compel[ling] a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.”⁵⁰ The quotation is followed immediately by Rutledge’s own gloss on author and bill: “I cannot believe that the great author of those words, or the men who made them law, could have joined in this decision.”⁵¹ What comes next, in a thirty-five page opinion with sixty-one footnotes, is an account of the passage of Jefferson’s Bill, including the role played by James Madison’s celebrated Memorial and Remonstrance Against Religious Assessments (which is also included as an appendix) and of the direct link between the Virginia documents and the First Amendment.⁵² At the conclusion of his opinion, Rutledge draws back from the details of history and statute to frame the issue, as he did in *Thomas*, at a high level of abstraction; the case is no longer merely about educational funding policies but instead, drawing on his own earlier opinion, about “the preferred place given in our scheme to the great democratic freedoms secured by the First Amendment”;⁵³

Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools In my opinion both avenues were closed by the Constitution. Neither should be opened by this Court. The matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison’s day it is one of principle, to

⁴⁷ *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

⁴⁸ *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

⁴⁹ *Id.* at 18.

⁵⁰ *Id.* at 28 (Rutledge, J., dissenting).

⁵¹ *Id.* at 29.

⁵² *Id.* at 63. According to Rutledge, “[a]ll the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison’s life, thought, and sponsorship.” *Id.* at 39. The two appendices to the dissent cover an additional eleven pages. *Id.* at 63–74.

⁵³ *Id.* at 62 n.61.

keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents. We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other.⁵⁴

Yet even in his soaring conclusion, Rutledge cannot entirely escape from his rival impulse to document—the ellipsis in this passage contains citations to two books and a student law review note.⁵⁵ This anticlimactic reference, like the enforcement details in the final footnote of *Thomas*, serves only to undermine the rhetorical force of his First Amendment vision.

In light of opinions like *Everson*, it is curious that in *In re Yamashita*⁵⁶ Rutledge begins his most celebrated dissent with a statement of serious reservations about disagreeing with the majority:

Not with ease does one find his views at odds with the Court's in a matter of this character and gravity. Only the most deeply felt convictions could force one to differ. That reason alone leads me to do so now, against strong considerations for withholding dissent.⁵⁷

As evidenced by his opinion-writing record, Rutledge was not usually reluctant to write separately. Of his 169 Supreme Court opinions, sixty-five were written for the Court, sixty-one were dissents, and forty-three were concurrences.⁵⁸ He wrote to friends that he considered dissents “more fun” than majority opinions because “one is more free to say what he wants to say” and “more valuable” than unanimity in analyzing “fundamental problems of social policy” that benefit from multiple perspectives.⁵⁹ *Yamashita*, however, was an unusual case, a challenge to the military commission that convicted the Commanding General of the Japanese Army in the Philippines of violations of the law of war and sentenced him to death for numerous atrocities committed by Japanese soldiers under his command against civilians and prisoners of war. Seven Justices upheld the conviction; Rutledge and Murphy filed separate dissents, based on Rutledge's suggestion to his colleague that ““You take

⁵⁴ *Id.* at 63 (citations omitted).

⁵⁵ The citation, omitted *supra* note 54, reads: “See Johnson, *The Legal Status of Church-State Relationships in the United States* (1934); Thayer, *Religion in Public Education* (1947); Note (1941) 50 *Yale L.J.* 917.” *Everson*, 330 U.S. at 63.

⁵⁶ *In re Yamashita*, 327 U.S. 1 (1946).

⁵⁷ *Id.* at 41 (Rutledge, J., dissenting). Justice Murphy joined in Rutledge's dissent. *Id.* at 81.

⁵⁸ FERREN, *supra* note 10, at 348.

⁵⁹ *Id.* at 196.

the charge, I'll take the balance."⁶⁰ Murphy joined Rutledge's opinion, but Rutledge chose not to join Murphy's.

Like his opinions in *Thomas* and *Everson*, Rutledge's *Yamashita* dissent is a blend of the abstract with the particular, covering forty pages with forty-two footnotes. The basic theme is the unfairness of the procedures used to convict Yamashita, an unfairness by which Rutledge finds himself "forced to speak."⁶¹ The passage setting out his thesis is among his most plainspokenly powerful:

More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of the war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.⁶²

Rutledge recognizes that Yamashita's trial is "unprecedented in our history"⁶³ and that the Court finds itself on "strange ground,"⁶⁴ but he is undeterred by the novelty of the legal landscape because "[p]recedent is not all-controlling in law."⁶⁵ Instead, he is prepared to find his way independently, guided by the judicial tradition of "the great landmarks left behind and the direction they point ahead."⁶⁶ Assessing the trial afforded Yamashita, Rutledge identifies several practices that violate the tradition: the commission was unconstitutionally constituted; no valid proof of the petitioner's knowledge of the crimes was presented; basic evidentiary rules were violated; the petitioner's counsel were given inadequate time to prepare his defense; and both the Articles of War and the Geneva Convention were held inapplicable to the proceedings.⁶⁷ Rutledge characteristically explores these issues in some detail, lamenting that "only a short sketch can be given concerning each matter."⁶⁸

⁶⁰ *Id.* at 303.

⁶¹ *In re Yamashita*, 327 U.S. at 42 (Rutledge, J., dissenting).

⁶² *Id.* at 41–42.

⁶³ *Id.* at 42.

⁶⁴ *Id.* at 43.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 43–45.

⁶⁸ *Id.* at 47.

The final section of the opinion, though brief, is the most sharply focused in its insistence that the Court has, *sub silencio*, denied Yamashita the protections of the Fifth Amendment Due Process Clause. “And this,” according to Rutledge, “is the great issue in the cause.”⁶⁹ Relying on intuition rather than precedent or history, he stakes out his own counterposition in broad terms:

I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute.⁷⁰

Rutledge’s dissent applies the intuition he celebrated in *A Declaration of Legal Faith* to constitutional text. He is asserting a new principle of law—that our constitutional tradition requires the application of Fifth Amendment protections even to an accused war criminal—with confidence that, “since every precedent has an origin,” he is justified in originating his expansive vision of the scope of due process.⁷¹

Read together, these three opinions—*Thomas*, *Everson* and *Yamashita*—suggest that Rutledge was an inevitable supporter of individual rights over the claims of government. Yet, in an essay written before his own appointment to the federal bench, Justice Stevens pointed out that “[n]either at the beginning nor the end of his judicial career did Justice Rutledge automatically champion a claimed individual liberty.”⁷² While Rutledge insisted on the right of even an enemy general to due process protections, he also joined the majority in both *Hirabayashi v. United States* and *Korematsu v. United States*,⁷³ cases upholding, respectively, the curfew for and internment of Japanese-Americans under military orders.⁷⁴ In *Hirabayashi*, decided four months after he joined the Court, Rutledge added a brief concurrence cautiously distancing himself from “the suggestion, if that is intended,” that the courts lacked power to

⁶⁹ *Id.* at 79.

⁷⁰ *Id.* at 81.

⁷¹ *Id.* at 43. Ferren distinguishes the methodology of Rutledge’s dissent from Murphy’s, calling the latter “a sermon based on natural law, not just on the Constitution.” FERREN, *supra* note 10, at 303.

⁷² Stevens, *supra* note 12, at 178.

⁷³ *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

⁷⁴ *Hirabayashi*, 320 U.S. at 102; *Korematsu*, 323 U.S. at 219.

review such military orders.⁷⁵ Acknowledging the “wide discretion” available to a military officer, Rutledge observed that “it does not follow there may not be bounds beyond which he cannot go and, if he oversteps them, that the courts may not have power to protect the civilian citizen,” although he found that “in this case that question need not be faced.”⁷⁶ As the junior Justice in *Korematsu*, he provided the tie-breaking ninth vote in support of internment, apparently feeling bound by his earlier vote in *Hirabayashi*.⁷⁷ Although Rutledge lived for almost five years after *Korematsu*, his biographer has found no evidence that he ever expressed regret for his vote in either of these cases.⁷⁸

There is another striking instance in which Rutledge found a countervailing value that led him to reject a claim of individual rights, this time under the First Amendment. Writing for a five Justice majority in *Prince v. Massachusetts*, he rejected the challenge by a Jehovah’s Witness to her conviction for violating a state child labor statute by allowing her niece to sell religious magazines on the street as required by their religion.⁷⁹ Rutledge found two rights at issue: the parent’s or guardian’s right “to bring up the child in the way he should go, which for appellant means to teach him the tenets and the practices of their faith,” and the child’s right to follow her faith by distributing the magazines as a method of preaching the gospel.⁸⁰ The countervailing value Rutledge identified was the state police power to protect children, an issue of particular concern to him since his defense of the proposed constitutional amendment to regulate child labor. Despite the “preferred position”⁸¹ of the religious right invoked by the appellant, Rutledge held that the state’s right to safeguard the child prevailed: “Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children”⁸² He cites no authority for that proposition; it is presumably supported by his intuition that the claimed right might “create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years,

⁷⁵ *Hirabayashi*, 320 U.S. at 114 (Rutledge, J., concurring).

⁷⁶ *Id.*

⁷⁷ See FERREN, *supra* note 10, at 249. Rutledge’s comments at conference suggest that his sense of military necessity overcame his reservations about both cases:

Announced Rutledge: “I had to swallow *Hirabayashi*. I didn’t like it. At that time I knew if I went along with that order I had to go along with detention for [a] reasonably necessary time. Nothing but necessity would justify it.” Because of *Hirabayashi*, he concluded, “I vote to affirm.”

Id. (footnote omitted).

⁷⁸ *Id.* at 258. Ferren offers a sympathetic rationale for Rutledge’s position. See *id.* at 255–59.

⁷⁹ *Prince v. Massachusetts*, 321 U.S. 158, 159, 170 (1944).

⁸⁰ *Id.* at 164.

⁸¹ *Id.* (citations omitted).

⁸² *Id.* at 170.

to face.”⁸³

This broad proposition, however loosely supported, is related to a more pragmatic strain in Rutledge’s jurisprudence: his concern with the practical consequences of Court decisions not only on the litigants but also on the wider population. It may appear, as it did in *Knauer v. United States*, as the basis for protecting a highly unsympathetic defendant, a German immigrant who continued to support Hitler’s regime and policies after becoming a naturalized American citizen.⁸⁴ The Court upheld the revocation of his citizenship on the ground that Knauer had committed fraud in swearing his oath of allegiance to the United States. Writing for himself and Justice Murphy, Rutledge announced at the outset that “[m]y concern is not for Paul Knauer,” whom he dismissed as “a thorough-going Nazi addicted to philosophies altogether hostile to the democratic framework in which we believe and live.”⁸⁵ His concern was rather for the consequences of a holding that distinguished naturalized from native-born citizens and thus created a vulnerable class: “[I]f one man’s citizenship can thus be taken away, so can that of any other.”⁸⁶ He had made the same argument seven months earlier, in a case overturning the revocation of citizenship of a member of the Communist Party, when he concurred to emphasize his concern over a decision that “[a]ctually, though indirectly, . . . affects millions” by creating a category of “citizenship in attenuated, if not suspended, animation.”⁸⁷ Just as his concern was practical, so was Rutledge’s solution—to employ “other effective methods for dealing with those who are disloyal, just as there are for such citizens at birth.”⁸⁸

Although most of Rutledge’s best known opinions urge vigorous protection of individual rights, one—*Rescue Army v. Municipal Court of Los Angeles*⁸⁹—is cited for a doctrine that seems an unlikely perspective for its author to advance. The case sets forth the arguments for what Rutledge calls the Court’s “policy of strict necessity in disposing of constitutional issues,”⁹⁰ its reluctance to exercise the power of judicial review over cases otherwise within its jurisdiction that challenge the constitutionality of government action. He catalogues the advantages of that reluctance:

possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other

⁸³ *Id.* at 169–70.

⁸⁴ *Knauer v. United States*, 328 U.S. 654, 675 (1946) (Rutledge, J., dissenting).

⁸⁵ *Id.*

⁸⁶ *Id.* at 676.

⁸⁷ *Schneiderman v. United States*, 320 U.S. 118, 165–66 (1943) (Rutledge, J., concurring).

⁸⁸ *Knauer*, 328 U.S. at 679.

⁸⁹ *Rescue Army v. Mun. Court of Los Angeles*, 331 U.S. 549, 550 (1947).

⁹⁰ *Id.* at 568.

repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system.⁹¹

This policy of restraint, he argues, has worked well “for the preservation of individual rights” in the past, even though it is difficult to administer: “It is largely a question of enough or not enough, the sort of thing precisionists abhor but constitutional adjudication nevertheless constantly requires.”⁹²

As a judicial role model, then, Rutledge offered an assortment of qualities for both emulation and skepticism. If his strong commitment to individual rights and his starkly simple vision of constitutional fairness offered an appealing conception of a Justice’s role, his methodology raised some concerns; Rutledge’s thoroughness tended to blunt the force of his opinions; his preference for a just result over precedent often left him writing separately; his work habits may have denied him the chance to write for the Court or for a unified dissent on issues of great import. For a recent law school graduate with a year to observe the role his Justice played in the Court’s decisionmaking dynamic, a Rutledge clerkship may have provided Stevens equal guidance on what to do and what not to do as a Supreme Court Justice.

C. *The Clerk and the Justice: Stevens on Rutledge*

It was literally a matter of luck that John Paul Stevens became law clerk to Justice Rutledge for the Court’s 1947 Term. In 1945 Stevens, discharged from his military service, enrolled in a program at Northwestern University School of Law that allowed veterans to complete the three-year curriculum in two years. During their second year, Stevens and Art Seider, co-editors-in-chief of the *Northwestern Law Review*, were offered clerkships with Rutledge and Chief Justice Vinson. The question was which editor would fill which clerkship. Stevens recently described the episode and its resolution for a special issue of the *Law Review*.⁹³

Willard Wirtz, then a professor of law at Northwestern, was a close friend of Justice Wiley Rutledge, and Willard Pedrick, also a law professor at Northwestern, had a close relationship

⁹¹ *Id.* at 571.

⁹² *Id.* at 574.

⁹³ Stevens, *supra* note 29, at 25. The fact that the issue is a symposium devoted to the Law Review—*The First Century: Celebrating 100 Years of Legal Scholarship*—may explain the limited scope of Stevens’s memories.

with Chief Justice Fred Vinson and had persuaded him to hire Frank Allen as a clerk for the 1947 Term. Unbeknownst to Art and me, the two Willards had had discussions with the two Justices and believed that two clerkships would be available to us: one with Rutledge during the 1947 Term and the other with the Chief Justice during the 1948 Term. Considering us equally qualified for both positions, they came to the Law Review office to find out which position each of us would prefer. While more prestige would attach to a clerkship for the Chief Justice, given our advanced age, we both wanted the earlier opportunity. To resolve the conflict, we resorted to a tie-breaking method, one that I have often been tempted to use during my years on the bench: We flipped a coin. Needless to say, I won the toss and have had nothing but fond memories of the Law Review and of my good friend Art ever since.⁹⁴

In telling the story, Stevens is candid that the basis for his preference was timing rather than prestige. He makes no mention of the significant jurisprudential differences between Rutledge and Vinson as a factor in his preference, and looking back on the coin toss Stevens makes no claim that the outcome paired him with the Justice whose legal views were more in harmony with his own. The fond memories invoked are limited to the *Law Review* and Art.

More than forty years earlier, however, Stevens had made clear his admiration for both Rutledge's jurisprudence and his approach to his judicial duties in what Alexander Bickel called "a most artistic, affectionate, but withal not uncritical sketch."⁹⁵ Stevens, then a partner in a Chicago law firm who had taught as an adjunct at the University of Chicago and Northwestern law schools, was invited to contribute a lecture on Rutledge that was subsequently published in a collection of essays on a handful of important Supreme Court Justices.⁹⁶ Although Stevens does not discuss his own clerkship experience in his piece, he does identify Rutledge as "primarily . . . a teacher,"⁹⁷ a role that suggests the potential mentoring relationship of Justice and clerk. Like his fellow clerk Louis Pollak and others, Stevens concedes the perceived weaknesses of Rutledge's opinion-writing: his long, sometimes repetitive opinions and the time he spent in drafting them.⁹⁸ Stevens makes clear, however, that

⁹⁴ *Id.* at 26 (footnotes omitted).

⁹⁵ Alexander M. Bickel, Book Review, 70 HARV. L. REV. 1126, 1129 (1957).

⁹⁶ Stevens, *supra* note 12, at 177, 200. The other Justices included were Holmes, John Marshall, Stone, Bradley, Brandeis, Sutherland, Hughes, and Taney. *Id.* at ix.

⁹⁷ *Id.* at 178.

⁹⁸ See *id.* at 182, 193–94 (giving an explanation for the length of Rutledge's opinions). Stevens notes, "Justice Rutledge frequently wrote long opinions, and sometimes his style seems redundant. He

these supposed faults are actually the consequences of distinct virtues. Thus, “the length was primarily a matter of finding it necessary to say a great deal in order to explain fully the reasons for his decision,”⁹⁹ and the time spent preparing an opinion reflected the care taken in decisionmaking:

Many judges find it easy to arrive at a decision but have great difficulty in preparing an opinion. For Justice Rutledge, the converse was true. He was slow in making decisions. His capacity to see the merit in both sides of a controversy prevented him from forming a judgment hastily—unless of course the issue had arisen before. Typically, however, he “mulled over” problems, to use his own phrase. He frequently advised others to take their time in making important personal decisions. When he was convinced, however—and there were times when lingering doubts remained even after an opinion was handed down—he usually found the preparation of an opinion easy. The work was time-consuming and exacting—for the most part he prepared drafts in his own hand—but not as difficult as the process of decision.¹⁰⁰

Stevens insists that “[a]lthough long, Rutledge’s opinions are easily read and understood” and that “his style was deliberately chosen to give full expression to his precise meaning, for he could express himself in terse and amiable fashion when he chose.”¹⁰¹ More fundamentally, he admires Rutledge’s “ability to see a problem from its various approaches,”¹⁰² a quality related to his tendency to consider the range of practical solutions to a legal problem. What others have viewed as stylistic weaknesses are, for Stevens, the hallmark of a thorough and pragmatic legal mind. “To me,” he concludes, “Rutledge’s long opinions are evidence of two virtues of a great judge—tolerance and judgment.”¹⁰³

It is noteworthy, in light of his own substantial record of concurrences and dissents, that Stevens views Rutledge’s use of separate opinions as “reflect[ing] a quality of integrity that is difficult to describe.”¹⁰⁴ When Rutledge wrote separately to clarify his position, even though he had also joined the majority, “[h]is conscience literally *forced* him to add the

habitually used a pair of words where one would have served almost as well.” *Id.* at 181.

⁹⁹ *Id.* at 182.

¹⁰⁰ *Id.* at 193–94. Stevens further argues that “[t]he former dean’s scholarship also contributed to the length of his opinions.” *Id.* at 182.

¹⁰¹ *Id.* at 181. Stevens provides an example of the pithier mode: “But this case boils down to an old adage about sauce and geese, which need not be given citation.” *Id.*

¹⁰² *Id.* at 185.

¹⁰³ *Id.* at 182.

¹⁰⁴ *Id.* at 193.

statement of the real basis for his vote.”¹⁰⁵ On this point, Stevens offers, somewhat obliquely, his own observations of what he terms Rutledge’s “amazing conscience.”¹⁰⁶ He cites Rutledge’s “refusal to accept free books from law publishers,” a seemingly “trivial” position “when described to others because no words can adequately picture the sincerity of purpose which motivated the Justice.”¹⁰⁷ More dramatically, Rutledge reluctantly recused himself from *Shelley v. Kraemer*,¹⁰⁸ the historic restrictive covenant case decided in the spring of Stevens’s clerkship year, “for a reason which was certainly trivial if measured by its capacity, or even its tendency, to influence his vote,”¹⁰⁹ the fact that the deed to his own home contained such covenants. According to Ferren, Rutledge wanted to sit, even “sending his clerks to the Recorder of Deeds office in search of a property law basis for finding his own covenants unenforceable,” because he felt strongly about the case and worried, unnecessarily as it turned out, that his vote might be needed to reach the right result.¹¹⁰

Stevens admires another quality in Rutledge that others have noted in Stevens’s own career on the bench. Although Rutledge believed that “the securing and maintaining of individual freedom is the main end of society,”¹¹¹ he was never a completely predictable judge. Stevens announces early in the essay that “[n]either at the beginning nor at the end of his judicial career did Justice Rutledge automatically champion a claimed individual liberty. In civil liberties cases, as in others, his judgments were predicated on a painstaking review of every aspect of the litigation which came before him for decision.”¹¹² As evidence, he points to the first and last cases Rutledge decided, one a professor’s claim of retaliatory termination for his testimony to a congressional committee and the other a criminal defendant’s challenge to a warrantless search of his car, both of which the Justice decided against the claimant.¹¹³ Stevens suggests that what he calls Rutledge’s “concern with the integrity of the

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* A former Stevens clerk, Christopher Eisgruber, has recently offered his own example of Stevens’s judicial conscience. When his law clerks urged Stevens to lobby Justice O’Connor for her vote on an abortion case, Stevens demurred: “The opinion, he told us, ought to stand or fall on the force of its reasons. He would feel uncomfortable talking to O’Connor about the opinion because she might feel pressured by the conversation.” CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 59 (2007).

¹⁰⁷ Stevens, *supra* note 12, at 193.

¹⁰⁸ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

¹⁰⁹ Stevens, *supra* note 12, at 193. The case was decided on May 3, 1948, with Justices Reed and Jackson also not participating. *Shelley*, 334 U.S. at 23.

¹¹⁰ FERREN, *supra* note 10, at 387. Reed and Jackson also had restrictive covenants in their deeds. *Id.*

¹¹¹ Stevens, *supra* note 12, at 191.

¹¹² *Id.* at 178–79.

¹¹³ See *Brinegar v. United States*, 338 U.S. 160, 177–78 (1949); *Cobb v. Howard Univ.*, 106 F.2d 860, 866 (D.C. Cir. 1939).

judicial process”¹¹⁴ was a primary source of his independence, making it possible for him to both reject sympathetic petitioners and support highly unpopular claims based on his reading of the record and his commitment to fairness. Stevens writes at some length about Rutledge’s *Yamashita* dissent, the most celebrated example of that independence, but opens the essay with a lesser known case, *Ahrens v. Clark*,¹¹⁵ which he views as also illustrative of Rutledge’s jurisprudence.

What Stevens does not mention is that he prepared a draft of *Ahrens* that Rutledge drew on heavily in his opinion, and—as Joseph T. Thai has demonstrated in his fascinating essay—the case represents a dramatic intersection of Justice and clerk.¹¹⁶ The omission is not surprising. In his many talks and occasional writings, Stevens seldom mentions Rutledge or refers to his clerkship. He has praised Ferren’s biography as “a superb piece of work that anyone interested in the history of our Court will enjoy immensely,” though not as a long overdue study of a personally admired Justice.¹¹⁷ His few references to his clerkship tend to provide a source of praise for his colleagues on the Court. Thus, Stevens recalls reading memos on *in forma pauperis* cases written by Justice White during his own clerkship with Chief Justice Vinson, “having been cautioned by my boss, Justice Rutledge, to examine them with particular care because he felt that the Vinson Chambers might overlook a meritorious claim. I don’t remember any flaws in the memos that were signed ‘BRW.’”¹¹⁸ And he notes that “[m]y favorable impression of Thurgood Marshall was first formed when, as a law clerk, I watched him argue in the Supreme Court . . .”¹¹⁹

Despite this scarcity of direct commentary by Stevens on his clerkship, there is evidence that links his year with Rutledge to Stevens’s later jurisprudence on issues of individual rights and due process protections. Diane Amann, a former Stevens clerk, has identified two cases from that term, in addition to *Ahrens*, which reveal Stevens in harmony with Rutledge.¹²⁰ In the file for a case challenging, on equal protection grounds, Oklahoma’s refusal to admit a black student to its law school, Amann has found a memo to Rutledge in which Stevens “advised taking judicial notice that ‘the doctrine of segregation is itself a violation of the Constitutional

¹¹⁴ Stevens, *supra* note 12, at 198.

¹¹⁵ *Ahrens v. Clark*, 335 U.S. 188 (1948).

¹¹⁶ See Joseph T. Thai, *The Law Clerk Who Wrote Rasul v. Bush: John Paul Stevens’s Influence from World War II to the War on Terror*, 92 VA. L. REV. 501, 507 (2006). See also *infra* notes 175–206 and accompanying text (discussing the writing of Rutledge’s opinion in *Ahrens v. Clark*).

¹¹⁷ John Paul Stevens, *What I Did This Summer*, CBA RECORD, Oct. 2004, at 34 (2004).

¹¹⁸ Justice John Paul Stevens, *Random Recollections*, 42 SAN DIEGO L. REV. 269, 277 (2005).

¹¹⁹ Justice John Paul Stevens, *Opening Assembly Address, American Bar Association Annual Meeting, Orlando, Florida, August 3, 1996*, 12 ST. JOHN’S J. LEGAL COMMENT. 21, 29 (1996).

¹²⁰ See Diane Marie Amann, *John Paul Stevens, Human Rights Judge*, 74 FORDHAM L. REV. 1569, 1589–92 (2006).

requirement’ and concluded that ‘if there is any chance of granting any relief, I would do so.’”¹²¹ In the second case, one seeking post-conviction relief based on the Byzantine nature of Illinois state court procedures, Rutledge incorporated language from another Stevens memorandum into his concurrence, including Stevens’s tart observation “that the Illinois procedural labyrinth is made up entirely of blind alleys, each of which is useful only as a means of convincing the federal courts that the state road which the petitioner has taken was the wrong one.”¹²² In chambers where the law clerk was strongly encouraged to voice any disagreement with his Justice, such memos suggest that Stevens and Rutledge occupied common ground on these issues. Even more persuasively, in a recent interview Stevens made explicit Rutledge’s influence on his executive power jurisprudence. Working with Rutledge on post-war security cases, Stevens said, “shaped his views about the importance of judicial oversight of the president’s aggressive actions in terrorism cases after 9/11.”¹²³ Such evidence supports Norman Dorsen’s observation that Stevens’s contextual approach to decisionmaking, his courage, and “his commitment to ‘fairness and justice’ make[] Stevens the intellectual heir of Justice Rutledge . . .”¹²⁴

III. JOHN PAUL STEVENS

A. *The Man*

The arc of Stevens’s life story is markedly different from that of Rutledge. While Rutledge was born to a clerical family of limited means in a small Kentucky town, Stevens was born into an affluent Chicago family in 1920. His grandfather founded the Illinois Life Insurance Co., and his father and uncle built the luxurious Stevens Hotel, whose lobby featured bronze statues for which Stevens and his brothers served as models.¹²⁵ In his comfortable boyhood, Stevens attended the University of Chicago laboratory school and encountered such notables as Amelia Earhart and Charles Lindbergh at the hotel.¹²⁶ That pleasant life was

¹²¹ *Id.* at 1589. The case was *Sipuel v. Board of Regents of the University of Oklahoma*, 332 U.S. 631 (1948). Amann notes that “Rutledge filed a lone dissent from the denial of mandamus, though on a ground less bold than that advanced in the memorandum.” Amann, *supra* note 120, at 1589–90.

¹²² Amann, *supra* note 120, at 1590 (quoting *Marino v. Ragen*, 332 U.S. 561, 567 (1947) (Rutledge, J., concurring)).

¹²³ Jeffrey Rosen, *The Dissenter*, N.Y. TIMES, Sept. 23, 2007, § 6 (Magazine), at 55, available at LEXIS, News Library, NYT File.

¹²⁴ Norman Dorsen, *John Paul Stevens*, 1992/93 N.Y.U. ANN. SURV. AM. L. xxv, xxv–xxviii.

¹²⁵ Charles Lane, *Finding Justice on a Small Scale; Recently Identified Archive Photo Captures a Young John Paul Stevens*, WASH. POST, June 5, 2005, at D1, available at LEXIS, News Library, WPOST File.

¹²⁶ *Id.* According to Amann, “Amelia Earhart scolded him for being out late on a school night, and Charles Lindbergh, just back from his landmark solo flight to Paris, gave the boy a dove.” Amann,

disrupted first by his family's financial problems following the 1929 crash and, more dramatically, by his father's subsequent conviction for embezzlement, eventually overturned by the Illinois Supreme Court in 1934.¹²⁷ Reflecting on the episode more than seventy years later, Stevens described it as "[a] totally unjust conviction" from which he learned "that the criminal justice system can misfire sometimes," a lesson reflected in his jurisprudence.¹²⁸

In contrast to Rutledge's academic struggles, Stevens graduated Phi Beta Kappa from the University of Chicago in 1941 and then enlisted in the United States Navy shortly before Pearl Harbor.¹²⁹ He served as a cryptographer in the Pacific, earning a bronze star and helping to break a code that contained information allowing United States pilots to shoot down the plane carrying Japanese Admiral Yamamoto.¹³⁰ According to Stevens, this targeting of "a particular individual" disturbed him and has influenced his approach to the death penalty, which he has said should be used sparingly and administered with great care.¹³¹ After the war, Stevens enrolled at Northwestern University School of Law, where he served as co-editor-in-chief of the *Law Review* and graduated with the highest grades on record before proceeding to the Court for his clerkship with Rutledge.¹³² Following his clerkship, Stevens became an antitrust attorney in Chicago and taught as an adjunct faculty member at Chicago area law schools.¹³³

Stevens's correspondence with Rutledge in the brief period between the end of his clerkship in 1948 and Rutledge's death in 1949 indicates that Stevens had considered a teaching position at Yale Law School but decided that he preferred private practice to an academic career for several reasons. In a letter written in early September 1948, following the clerkship, he told Rutledge that "[e]ven after all the thought I have given the problem, I find it somewhat difficult to articulate the reasons for my decision"¹³⁴ but then went on to delineate the mix of predilection and pragmatism informing his choice:

Perhaps the main reason is that I really think I will [sic] enjoy practice more than teaching. As part of the same reason, I think that I need the practical experience to round out my

supra note 120, at 1580.

¹²⁷ Lane, *supra* note 125.

¹²⁸ Rosen, *supra* note 123, at 54–55.

¹²⁹ Richard Y. Funston, *Stevens, John Paul*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 976 (Kermit Hall ed., 2d ed. 2005) (revised by Thomas E. Baker).

¹³⁰ Rosen, *supra* note 123, at 55.

¹³¹ *Id.* (quoting Stevens).

¹³² Funston, *supra* note 129, at 976.

¹³³ *Id.*

¹³⁴ Letter from John Paul Stevens to Wiley Rutledge (Sept. 4, 1948), *available in* Box 46, Wiley Rutledge Collection, Manuscript Reading Room, James Madison Memorial Building, Library of Congress, Washington, D.C. [hereinafter Rutledge Papers Box 46].

character. Almost my entire life has been spent in academic circles, and even my navy work was of a peculiarly scholarly type. I think also that while I will learn something from seeing the reactionaries' side of things, that [sic] my philosophy is sufficiently developed so that I will not be converted from my present general point of view. Also, though I think you [sic] would disagree on this point, I am inclined to feel that there is more chance of both practicing and teaching if I start with the practice. In other words, I think it will be easier to move from practice into teaching than vice versa.¹³⁵

The letter shows Stevens weighing his intellectual interest in the law against the appeal of the more active engagement of private practice and opting for the latter, at least at first, as a way of completing his education without any risk of altering his personal philosophy or foreclosing a subsequent teaching career. In its calm assessment and candid pragmatism, the letter foreshadows Stevens's later approach to his judicial duties. Though he remained in practice, Stevens taught as a lecturer at Northwestern University from 1950 to 1954 and at the University of Chicago from 1954 to 1958, proving his early prediction of combining two careers to be at least temporarily accurate.¹³⁶ In a 1949 letter to Rutledge, Stevens's further reflections on his future career also foreshadowed his independent nature; he reports that, although he "like[s] working for this firm as well as I would any other," he hopes "to hang out a shingle with one or two other fellows of about my age," a goal he met two years later.¹³⁷ Appointed by President Nixon to the Seventh Circuit in 1970, he served for five years before his nomination to the Supreme Court in 1975 by President Ford was confirmed unanimously by the Senate.¹³⁸

Despite their divergent backgrounds and educational experiences, Rutledge and Stevens do have in common several notable aspects of their professional lives. Both were, in a sense, Midwesterners—one by adoption, the other by birth—who came to the Supreme Court after relatively brief stints on Courts of Appeals. Both were drawn to a career as a legal academic, though Stevens resisted the pull, and both brought to the

¹³⁵ *Id.*

¹³⁶ 8 A *Biographical Sketch of John Paul Stevens*, THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1975, at 3 (compiled by Roy M. Mersky & J. Myron Jacobstein, 1977) [hereinafter HEARINGS].

¹³⁷ Letter from John Paul Stevens to Wiley Rutledge (Jan. 22, 1949), available in Rutledge Papers Box 46, *supra* note 134. Stevens started his own firm in 1951. Robert J. Sickels, *John Paul Stevens*, in THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1995, at 502 (Clare Cushman ed., 2d ed. 1995).

¹³⁸ See Sickels, *supra* note 137, at 502-03 ("The Senate confirmed Stevens December 17, 1975, 98-0, and he took the oath of office two days later at the age of fifty-five.").

Court a hands-on approach to their judicial responsibilities. Although the current volume of cert filings makes it impossible for any Justice to follow Rutledge's commitment to examining all cert petitions personally, Stevens continues to insist that "[o]nly when a justice and his clerks individually review each of the petitions . . . can they ensure that the other justices aren't overlooking important allegations of wrongdoing from marginalized applicants whose voices deserve to be heard."¹³⁹ And just as Rutledge regarded it as his duty to acknowledge in his opinions all of counsel's arguments, so Stevens defends his practice of frequent dissents and concurrences in part because he "think[s] the litigants are entitled to know how the judges appraised the arguments and to be sure that all of them understood the arguments that were presented"¹⁴⁰ and, even more precisely, that those arguments "were persuasive to some even though not to all."¹⁴¹

Although it is difficult to gauge with precision the extent to which Stevens's approach to his Court duties has been influenced by his year with Rutledge, there is one aspect of Stevens's Court life that does seem to reflect directly his own clerkship experience: the relationship of Justice and clerk.

B. *In Chambers: The Clerkship*

As one of the five clerks turned Justices, Stevens has had the relatively rare opportunity of playing both roles, and it appears that he has in some respects chosen to recreate the roles that he and Rutledge played in the 1947 Term. Two recent books on Supreme Court law clerks provide some inside information, most from interviews with former clerks, on the ways in which Rutledge and Stevens have used their clerks. That information, more abundant for the Stevens than the Rutledge clerks, nonetheless indicates that Stevens has chosen to follow some of his Justice's practices. Todd Peppers has described Stevens as "the only sitting Supreme Court justice who has not fully adopted the rules and norms of the modern clerkship model" but has instead chosen to follow "the prevailing Court norms of the 1940s" that shaped his own clerkship,¹⁴² even preferring to hire fewer clerks than the number authorized by Congress.¹⁴³ Under those earlier norms, as described by former Rutledge clerks Victor Brudney and Richard F. Wolfson, Rutledge formed "an intimate association" with his

¹³⁹ Rosen, *supra* note 123, at 72 (paraphrasing Stevens).

¹⁴⁰ HEARINGS, *supra* note 136, at 69.

¹⁴¹ *Id.* at 41.

¹⁴² PEPPERS, *supra* note 3, at 195.

¹⁴³ See LAZARUS, *supra* note 1, at 19 ("Currently, every Justice is entitled to four clerks, though Chief Justice Rehnquist and Justice John Paul Stevens employ only three.").

law clerks in which “the clerk was constantly made to feel equal.”¹⁴⁴ That equality included the license to discuss cases freely, a practice Rutledge strongly encouraged:

He wanted to know the ideas of a different generation, and he wanted someone around him who would feel free to offer these ideas. To this end he encouraged his law clerk to put forward his own notions and prodded him to defend them. A visitor sitting outside the Justice’s office might be surprised to hear strong words within, both in the Justice’s familiar drawl and in a younger voice. For if his law clerk took the hint and pressed hard, the Justice felt free to retort in kind.¹⁴⁵

When the Court was considering *Hirabayashi*, Brudney apparently took the license too far, suggesting that Rutledge look at an FBI report expressing reservations about the proposed treatment of Japanese Americans. Brudney has reported Rutledge’s explosion:

What do you think you are doing? Don’t you understand that there are only nine of us sitting here, and that the generals have said this [curfew] is necessary for the preservation and security of the country? Pearl Harbor was attacked and more may happen! Who are we to question this? What makes you think any of us will question this? Too much is at stake, and we are too far removed from the realities. Cut it out!¹⁴⁶

Even in his state of heightened irritation, Rutledge speaks to Brudney more as an equal than as a subordinate. The “we” who have no right to question the generals may be read to include both clerk and Justice, who alike are compelled to accept the claim of national security. The rebuke, though vigorous, at no point relies on Brudney’s inferior role of clerk as its basis.

On a more practical level, the Rutledge clerk participated in every phase of the decisionmaking process:

His attention was directed to every aspect of the Justice’s work. Not only was each case and petition for certiorari a candidate for joint examination, but the draft opinions of other Justices were regularly left with the clerk for comment and frequently for discussion. And the clerk was expected to

¹⁴⁴ Brudney & Wolfson, *supra* note 27, at 460.

¹⁴⁵ *Id.* That close relationship may be the reason that Rutledge tried working with two clerks in the 1942 and 1943 Terms but found that he preferred to have only one clerk. WARD & WEIDEN, *supra* note 3, at 37.

¹⁴⁶ FERREN, *supra* note 10, at 246. Brudney may have been a special case. Rutledge observed that “I have never had a clerk who fought with me so hard when we differed as Vic did. More than once I threw him out of my office only to have him come back and reopen the argument.” *Id.* at 227–28 (footnote omitted).

contribute his views as to the result to be reached, as well as to the rationale to reach it. Indeed, he was at liberty, one half hour before a decision was to be announced, to go into the Justice's office and plead again that he change his vote.¹⁴⁷

One task that a Rutledge clerk did not routinely perform, however, was that of drafting opinions. Rutledge's preferred writing method was "to draft and redraft" himself, a process that began "[a]fter extensive reading and discussion of the case with his law clerk."¹⁴⁸ The clerk provided research assistance, and occasionally that material might find its way into the final opinion: "[I]f the law clerk's earlier research resulted in a draft opinion which coincided with the Justice's notions of the case, he would use it as a text—interlineating, cutting, and adding."¹⁴⁹ But such occasions were rare: "More often, he would begin afresh, and, using some of the materials from his clerk's memorandum, he would write, cross out, and write again."¹⁵⁰ Rutledge did allow his law clerk to draft one opinion during the Court Term; Stevens recalled writing the first draft of both a majority opinion and a concurrence during his year.¹⁵¹ The collaborative relationship between Rutledge and his clerks extended to preparation for the Court's conferences, a joint process that was both physically and intellectually demanding:

Characteristic of the thoroughness with which he devoted himself to that business were the sessions on Friday nights before the regular Saturday conferences. It was his custom—until forbidden to do so by his doctor—to sit with his law clerk, into the following morning if necessary, and go over in detail the cases to be decided and the petitions for certiorari. Every memorandum on an *in forma pauperis* petition, of which there were an increasing number during his tenure, was carefully read, underlined, and discussed, and if there were any doubts, the original, often ill-written papers were sent for and examined.¹⁵²

The Rutledge clerk, though by no means a full partner in the chambers enterprise, was a confidante, a sounding board, and a trusted advisor as well as an assistant expected to work as hard as the Justice himself—no easy standard to meet.

Reflecting on the relationship shortly after his own appointment to the

¹⁴⁷ Brudney & Wolfson, *supra* note 27, at 460.

¹⁴⁸ *Id.* at 457.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See PEPPERS, *supra* note 3, at 130, 266 n.293.

¹⁵² Brudney & Wolfson, *supra* note 27, at 456.

Court, Stevens used an intriguing analogy:

An interesting loyalty develops between clerks and their Justices. It is much like a lawyer-client relationship, close and confidential. Like a lawyer, a clerk can't tell his client, the Justice, what to do. He can only suggest what can happen if he does or doesn't do something.¹⁵³

The clerk as lawyer-advisor carries two burdens, cautioning the Justice on consequences as well as preserving the confidentiality of their exchanges, an issue that drew increased attention on the Burger Court after the revelations of *The Brethren* in 1979.¹⁵⁴ Despite the rigors of his own experience with Rutledge, Stevens nonetheless has concluded that "I had a lot less responsibility than some of the clerks now. They are much more involved in the entire process now."¹⁵⁵ That conclusion may rest in large part on the expanded role currently played by the Court's law clerks in the certiorari process. Starting in 1972, several Justices—five originally, eight on the Rehnquist and Roberts Courts—agreed to pool their law clerks and share a single memorandum assessing each cert petition rather than to require separate memoranda from their own clerks.¹⁵⁶ When Stevens joined the Court in 1975, he decided not to participate in the cert pool because of his own law clerk experience: "I had some familiarity with cert work, and I thought I could get through the certs faster without joining the pool. And that opinion hasn't changed."¹⁵⁷ He has also observed that "[i]f I made all the rules, I don't think I'd want it,"¹⁵⁸ preferring instead to secure an independent review from his own clerks, who provide him with memos only on the petitions they flag as important. Stevens has reflected on the effect of his practice:

I have found it necessary to delegate a great deal of responsibility in the review of certiorari petitions to my law clerks. They examine them all and select a small minority that they believe I should read myself. As a result, I do not

¹⁵³ WARD & WEIDEN, *supra* note 3, at 245 (footnote omitted).

¹⁵⁴ WOODWARD & ARMSTRONG, *supra* note 1. For another controversial book about the Court by a law clerk, see LAZARUS, *supra* note 1. Although the original subtitle of his book was *The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*, it was changed in the second edition to a more tactful formula. See EDWARD LAZARUS, *CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT* (1999).

¹⁵⁵ WARD & WEIDEN, *supra* note 3, at 203 (footnote omitted).

¹⁵⁶ For an account of the creation and operation of the cert pool, see *id.* at 117–25. The original five Justices were Powell, Rehnquist, White, Blackmun, and Burger; those declining to join were Douglas, Brennan, Stewart, and Marshall. *Id.* at 119. Stevens remains the only Justice of the Roberts Court not participating in the pool. See *An Interview with Supreme Court Justice John Paul Stevens*, 39 *THIRD BRANCH* (April 2007), <http://www.uscourts.gov/ttb/2007-04/interview/index.html> (last visited June 28, 2008) [hereinafter *Interview*].

¹⁵⁷ *Interview*, *supra* note 156.

¹⁵⁸ WARD & WEIDEN, *supra* note 3, at 109.

even look at the papers in over eighty percent of the cases that are filed.¹⁵⁹

Thus, in different ways, the clerks inside the pool, who collectively provide a single review of each cert petition for most of the Justices, and Stevens's own clerks, who themselves scan all petitions, play a large role in shaping the Court's final docket. Under the Rutledge model, the Justice himself saw all the cert petitions, an admittedly far smaller number than that filed with the current Court, which would make such a review impossibly burdensome.¹⁶⁰ Under the Stevens model, the Justice relies on his clerks to identify the potentially certworthy petitions on their own. In light of the procedures used both in his own chambers and in the pool, Stevens has accurately acknowledged a significant new responsibility that has been assigned to the current generation of clerks. And although Stevens has faced reality and departed from the cert practice of the Rutledge clerkship, he has retained its spirit, trusting his clerks and relying on their counsel in meeting the crucial responsibility for docket formation while at the same time making a serious effort to hear the claims of "marginalized applicants."¹⁶¹

In performing the most important task of a Supreme Court Justice, opinion-writing, Stevens has followed not only the spirit but the letter of the Rutledge chambers: Stevens is highly unusual among recent Justices in consistently writing his own first drafts which, according to former clerks, he then gives to a clerk for a thorough review of both content and style.¹⁶² Stevens has offered several explanations for his chosen approach. He notes bluntly that "I'm the one hired to do the job."¹⁶³ More expansively, he has said that writing the first draft "is for self-discipline. I don't really understand a case until I write it out."¹⁶⁴ And he has found that his "draft is typically much shorter than a law clerk's draft, and the justice is less likely to showboat with long cites and flowery language."¹⁶⁵ Stevens is surely justified, at least with regard to his own chambers, in insisting that "[t]he justices work very hard. The idea that the clerks do all the work is nutty."¹⁶⁶ At the same time, Stevens expects his clerks to participate fully

¹⁵⁹ *Id.* at 126 (footnote omitted).

¹⁶⁰ In the 1947 Term, when Stevens clerked, the Court received 426 cert petitions. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1948, at 78. By contrast, in the 2006 Term the Court reviewed 8,922 cert petitions, a twenty-fold increase. *The Supreme Court, 2006 Term—The Statistics*, 121 HARV. L. REV. 436, 444 (2007).

¹⁶¹ Rosen, *supra* note 123, at 72 (paraphrasing Stevens).

¹⁶² See PEPPERS, *supra* note 3, at 195; WARD & WEIDEN *supra* note 3, at 222–23.

¹⁶³ PEPPERS, *supra* note 3, at 195 (internal quotation marks omitted).

¹⁶⁴ WARD & WEIDEN, *supra* note 3, at 223 (internal quotation marks and footnote omitted).

¹⁶⁵ PEPPERS, *supra* note 3, at 195. Stevens has recently explained that "[s]ometimes the draft is pretty short, . . . but at least I write enough so that I've had a chance to think it through." Rosen, *supra* note 123, at 72 (internal quotation marks omitted).

¹⁶⁶ WARD & WEIDEN, *supra* note 3, at 200.

in the challenging intellectual effort of deciding cases. Like Rutledge, he turns to them for no-holds-barred discussions of pending cases. According to one former clerk, “I can imagine few bosses so interested in the views of their employees, so prepared to engage in free-flowing debate, and so enthusiastic to be proven wrong.”¹⁶⁷ The passage could as easily be applied to Rutledge as to Stevens, who seem to have had in common a warm relationship with their clerks.¹⁶⁸ That kinship is reflected in the inscription Stevens writes on the photograph of himself he gives to each departing law clerk, “To my friend and former law clerk, with appreciation and affection”—precisely the language that Rutledge inscribed on the photograph he gave to Stevens at the end of his clerkship year.¹⁶⁹

The tie between Justice and clerk established during their shared Court year extended over the brief, fifteen month period between Stevens’s departure from the Court and Rutledge’s death. Rutledge’s papers include five letters from Stevens and three responses from Rutledge, and their correspondence contains more than thanks for the photograph and compliments on some of the Justice’s opinions.¹⁷⁰ The former clerk’s letters, some typed and some handwritten, vary in length from a short cover note for an enclosed article to a seven page letter on personal and legal topics. Stevens writes about the baby he and his wife have adopted, and Rutledge responds, eliciting from the proud father agreement that the Justice is “correct in assuming that John Joseph is the lord of all he surveys.”¹⁷¹ Stevens writes as well about his hope of opening his own firm, his reactions to the Alger Hiss trial, and Justice Murphy’s death.¹⁷²

¹⁶⁷ PEPPERS, *supra* note 3, at 197 (footnote omitted).

¹⁶⁸ Christopher Eisgruber, a Stevens clerk during the 1989 Term, has recounted a revealing anecdote, passed down from clerk to clerk, about Stevens’s reaction upon finding a female clerk pressed into service by another Justice to serve coffee at a Court reception: “He approached her and said, ‘Thank you for taking your turn with the coffee. I think it’s my turn now.’ And Justice Stevens took the coffee pot and began serving the clerks.” Christopher L. Eisgruber, *John Paul Stevens and the Manners of Judging*, 1992/93 N.Y.U. ANN. SURV. AM. L. xxix, xxx. That respect for all the Court’s clerks is combined with an informal working relationship with his own clerks. According to Eisgruber, “Justice Stevens would settle into the black leather armchair by the door” of the clerks’ office and “would chat with us for a few minutes” before listening to a clerk’s report on a case: “Then Justice Stevens would smile, thank me, and say something like, ‘You know, I was re-reading the briefs while the football game was on last night, and I happened to notice a footnote . . .’ And there might follow a satisfying resolution of the case that I had completely overlooked.” *Id.* at xxix–xxx.

¹⁶⁹ Richard Brust, *Setting Precedent in Two Wars*, 48 A.B.A.J. (Sept. 2007), available at http://www.abajournal.com/magazine/setting_precedent_in_two_wars/print/ (last visited June 28, 2008). According to Jeffrey Rosen, “[a] portrait of Rutledge,” presumably the inscribed photograph, “hangs in Stevens’s chambers.” Rosen, *supra* note 123, at 55.

¹⁷⁰ Letter from John Paul Stevens to Wiley Rutledge (July 11, 1949), available in Rutledge Papers Box 46, *supra* note 134.

¹⁷¹ *Id.*; Letter from John Paul Stevens to Wiley Rutledge (Jan. 22, 1949), available in Rutledge Papers Box 46, *supra* note 134.

¹⁷² Letter from John Paul Stevens to Wiley Rutledge (Jan. 22, 1949), available in Rutledge Papers Box 46, *supra* note 134; Letter from John Paul Stevens to Wiley Rutledge (July 11, 1949), available in Rutledge Papers Box 46, *supra* note 134; Letter from John Paul Stevens to Wiley Rutledge (July 22, 1949), available in Rutledge Papers Box 46, *supra* note 134.

Rutledge sends news of his family vacation and of his trip to visit the ailing Victor Brudney, his former clerk, then in a New York hospital.¹⁷³ The tone throughout is sociable and relaxed. If not exactly colleagues, Rutledge and Stevens seem to share an interest in one another's lives and in their continued contact. The correspondence suggests that Rutledge's inscription was more than a *pro forma* gesture to a departing clerk. Although Stevens is not given to effusive praise, he included Rutledge in a select pantheon. When asked recently about his judicial heroes, he offered a brief list: "John Marshall, of course. And Brandeis, Holmes and Cardozo were the three heroes when I was in law school, and I still consider them among the greatest to have served on this court. And, of course, Justice Rutledge was and remains a hero."¹⁷⁴

Whatever influence his year with Rutledge may have had on Stevens's use of his own clerks, there is one extraordinary episode that directly links his roles as clerk in 1948 and as Justice more than half a century later in 2004. The case of *Ahrens v. Clark*, which appeared on the Court's docket during the 1947 Term, involved habeas corpus petitions filed by German citizens held at Ellis Island under a deportation order.¹⁷⁵ The threshold issue before the Court was whether, under the habeas statute, the district court had jurisdiction to review a habeas petition filed by petitioners located outside its territorial jurisdiction.¹⁷⁶ In a brief opinion for a six Justice majority, Justice Douglas held that the district court did not have jurisdiction, but declined to address the further problem of detainees held outside the jurisdiction of any federal court.¹⁷⁷ Rutledge wrote the dissent, joined by Justices Black and Murphy, which argued that the crucial factor was the location of the custodian rather than the detainees; since the Attorney General was clearly within the district court's jurisdiction, that court could review the habeas petitions.¹⁷⁸ As Joseph Thai has demonstrated, Stevens played a key role in shaping Rutledge's dissent.¹⁷⁹ In the draft that Rutledge had requested, Stevens framed the argument later presented by the dissent that the location of the petitioner was not jurisdictional but instead merely one factor relevant to the question of the proper venue.¹⁸⁰ Rutledge also adopted Stevens's critique of the issue reserved by the majority; under the Court's detainee-based rule, Stevens

¹⁷³ Letter from Wiley Rutledge to John Paul Stevens (Sept. 17, 1948), *available in* Rutledge Papers Box 46, *supra* note 134.

¹⁷⁴ *Interview*, *supra* note 156.

¹⁷⁵ *Ahrens v. Clark*, 335 U.S. 188, 189 (1948).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 192–93.

¹⁷⁸ *See id.* at 194–95, 199–200 (arguing that the detainees' location is less important than the custodian's location in habeas cases).

¹⁷⁹ *See* Thai, *supra* note 116, at 510 ("In critical respects . . . [Rutledge's draft] incorporated Stevens's arguments into its own.").

¹⁸⁰ *Id.* at 508–09.

concluded, “all such questions will in the future be resolved against such petitioners.”¹⁸¹ Rewritten by Rutledge, the passage in *Ahrens* makes that point at characteristically greater length:

For if absence of the body detained from the territorial jurisdiction of the court having jurisdiction of the jailer creates a total and irremediable void in the court’s capacity to act, what lawyers call jurisdiction in the fundamental sense, then it is hard to see how that gap can be filled by such extraneous considerations as whether there is no other court in the place of detention from which remedy might be had . . .

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Some twenty-five years later, well after Rutledge’s death, and two years before Stevens’s Supreme Court appointment, the Court revisited the habeas issue expressly decided in *Ahrens*. Reversing its course in *Braden v. 30th Judicial Circuit Court of Kentucky*, the Court ruled that the presence of the custodian within the district court’s jurisdiction was sufficient to permit habeas review and read *Ahrens* as limited to venue alone.¹⁸³

It took another thirty years for the issue to make its third appearance, this time in the context of habeas petitions filed by Guantanamo detainees in the district court for the District of Columbia in *Rasul v. Bush*, where the Court held that federal jurisdiction existed.¹⁸⁴ Stevens was the key protagonist in the third act of this drama. Not only was he the author of the Court’s opinion; as the senior Justice in the majority he had also assigned the case to himself. Furthermore, in a rare theatrical stroke, Stevens astonished counsel for both sides by introducing into oral argument a case neither side had anticipated as crucial: *Ahrens v. Clark*.¹⁸⁵ The prevailing assumption by counsel and by most members of the Court was that the controlling case would be *Johnson v. Eisentrager*, a 1950 decision in which the Court found no constitutional basis for review of habeas petitions filed by German citizens imprisoned by the United States in Germany after their conviction by a military tribunal.¹⁸⁶ Stevens’s argument in *Rasul*, addressed repeatedly to bewildered counsel, was that *Eisentrager* had been decided while *Ahrens* was still good law; once *Braden* overturned *Ahrens*, however, there was no need of the

¹⁸¹ *Id.* at 510.

¹⁸² *Ahrens*, 335 U.S. at 209.

¹⁸³ *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 500 (1973).

¹⁸⁴ *Rasul v. Bush*, 542 U.S. 466, 473 (2004).

¹⁸⁵ Thai notes, “[n]one of the parties relied on *Ahrens* or *Braden* for their jurisdictional arguments.” Thai, *supra* note 116, at 516. The government made no mention of either case in its brief; the petitioners’ briefs made only slight use of both cases. *Id.* at 516–17.

¹⁸⁶ *Johnson v. Eisentrager*, 339 U.S. 763, 766–68 (1950).

constitutional basis for habeas jurisdiction that the *Eisentrager* Court found lacking.¹⁸⁷ The habeas statute itself supported jurisdiction as long as the custodian was within the territorial range of the district court, as was the situation in *Rasul*. After petitioners' attorney repeatedly missed Stevens's point, he "concluded with a chuckle that counsel would not '[l]et me help you.'"¹⁸⁸ As Thai aptly observes, "[i]n one hour of oral argument, then, Justice Stevens managed to undermine the previously unquestioned validity of a decades-old decision, and to raise from historical obscurity to doctrinal relevance a dissent he had helped draft as a law clerk."¹⁸⁹ If petitioners' counsel rejected Stevens's help at oral argument, they surely appreciated his opinion, which held that "[b]ecause subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager*'s resort to 'fundamentals,' persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review."¹⁹⁰

The remarkable saga of *Ahrens v. Clark* illustrates both the ties and the distinctions between Stevens and Rutledge. Although Stevens was himself a major source of the views advanced in *Ahrens*, he considers the final dissent "by no means [Rutledge's] finest, . . . nevertheless sufficiently representative to provide us with an introduction to its author's judicial career."¹⁹¹ What Stevens admires in *Ahrens* is Rutledge's sense that the majority's decision "'attenuates the personal security of every citizen.'"¹⁹² The longer passage from the dissent Stevens quotes is indeed characteristic of Rutledge's jurisprudence in its concern for the troubling consequences that follow from the holding: the lack of any relief when the petitioner and the custodian are located in different judicial districts or, more alarmingly, when an American citizen is detained outside U.S. borders.¹⁹³ Those concerns, Stevens insists, "prove" that a five-page majority opinion warranted an eighteen-page dissent, another element representative of Rutledge's approach.¹⁹⁴

¹⁸⁷ See Thai, *supra* note 116, at 520.

¹⁸⁸ *Id.* Stevens's comment is partially obscured on the tape of oral argument by laughter, either his own, as Thai assumes, or that of others in the courtroom. U.S. Supreme Court Media, www.oyez.org (last visited Sept. 15, 2008). Although the comment does not appear in the written transcript provided on the oyez website, it does appear in the version available on the Supreme Court's official website. Transcript of Oral Argument at 14, *Rasul v. Bush*, 542 U.S. 446 (2004) (No. 03-334), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-334.pdf.

¹⁸⁹ Thai, *supra* note 116, at 522. For a detailed analysis of the exchanges concerning *Ahrens*, see *id.* at 518–22.

¹⁹⁰ *Rasul v. Bush*, 542 U.S. 466, 478 (2004).

¹⁹¹ Stevens, *supra* note 12, at 178.

¹⁹² *Id.* at 180 (quoting *Ahrens v. Clark*, 335 U.S. 188, 194 (1948) (Rutledge, J., dissenting)).

¹⁹³ See *Ahrens v. Clark*, 335 U.S. 188, 195 (1948) ("What also of the situation where [the jail] is located in one district, but the jailer is present in and can be served with process only in another? And if the place of detention lies wholly outside the territorial limits of any federal jurisdiction . . . is there to be no remedy?").

¹⁹⁴ Stevens, *supra* note 12, at 181.

Although Stevens does not make the point, *Ahrens* is representative of Rutledge's work in another way, by asserting broad principles of justice to support its position.¹⁹⁵ Rutledge makes such assertions twice, in similar language. Early in the dissent, he argues that the Court has avoided narrow applications of habeas "out of regard for the writ's great office in the vindication of personal liberty."¹⁹⁶ Towards the end, Rutledge returns to the same idea, noting "the writ's classic availability . . . as a prime safeguard of freedom."¹⁹⁷ He also offers a third variation on the theme at greater length, insisting that:

a due and hitherto traditional regard for the writ's high office should dictate resolving any doubt, as between the possible constructions, against a jurisdictional limitation so destructive of the writ's availability and adaptability to all the varying conditions and devices by which liberty may be unlawfully restrained.¹⁹⁸

In contrast, Stevens's majority opinion in *Rasul*, a considerably more prominent and controversial case, is sixteen pages long, three pages shorter than Justice Scalia's dissent.¹⁹⁹ The core section of the opinion is in fact only four pages long, an economical account of the impact of *Braden* on *Eisentrager* that forgoes any celebration of the habeas writ in favor of a brief analysis of the sequence of cases.²⁰⁰ Stevens quotes from the *Ahrens* dissent only once, consigning the passage to a footnote, although he does include a parenthetical reference in the text naming Rutledge as the author.²⁰¹ The passage itself echoes the technical point from Stevens's original draft: that the issue supposedly reserved by the majority is in fact decided, since the Court's holding would bar habeas jurisdiction in that situation.²⁰² *Rasul*'s final jurisprudential victory is thus shared by Stevens with Rutledge, collaborators in the *Ahrens* dissent, but with a twist: Stevens replaces Rutledge's warm praise of habeas as a protector of individual liberty with a coolly restrained analysis of overturned precedent.²⁰³

Stevens made clear his sense of the enduring nature of the

¹⁹⁵ Craig Green has celebrated this quality. "Rutledge's dissent is just the kind of opinion that great judges strive to write: technically dominant without quibbling, normatively grounded without preaching, and urgent without fretting." Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. L. REV. 99, 117 (2006).

¹⁹⁶ *Ahrens*, 335 U.S. at 194.

¹⁹⁷ *Id.* at 206.

¹⁹⁸ *Id.* at 206–07.

¹⁹⁹ *Rasul v. Bush*, 542 U.S. 466, 470–85, 488–506 (2004).

²⁰⁰ See *id.* at 476–79 (analyzing the Supreme Court's previous habeas cases).

²⁰¹ *Id.* at 477 & n.7.

²⁰² *Id.* at 477 n.7.

²⁰³ Green agrees that Stevens's "affirmative argument for habeas jurisdiction is spare; indeed, even its link to Rutledge is underemphasized." Green, *supra* note 195, at 121.

jurisprudential bond between Justice and clerk toward the close of the Court's 2006 Term. In a dissent delivered in part from the bench, Stevens criticized Justice Kennedy's majority opinion in *Uttecht v. Brown*, which overturned a Ninth Circuit decision by Judge Alex Kozinski upholding a trial judge's refusal to dismiss a juror who voiced reservations about the death penalty.²⁰⁴ The critique relied in two respects on the close tie between Justice and clerk. Stevens expressly argued that Kozinski "surely was entitled to assume that the law had not changed so dramatically in the years following his service as a law clerk to Chief Justice Burger" as to support the reversal of a longstanding precedent.²⁰⁵ For Stevens, then, the law clerk retains a particularly acute sense of the law as he or she knew it during the clerkship year, much as Stevens was apparently alone in appreciating the impact of *Ahrens* on *Eisentrager*. Linda Greenhouse has also pointed out, however, a subtler "subtext" to Stevens's observation about Kennedy and Kozinski:

Justice Kennedy and Judge Kozinski are particularly close. Justice Kennedy was himself once a judge on the Ninth Circuit, and Alex Kozinski was his law clerk. And Justice Kennedy regularly hires Judge Kozinski's law clerks to work at the Supreme Court.²⁰⁶

Greenhouse reads what she terms Stevens's "oblique but unmistakable reference in print to this special relationship" as "an expression of the liberal justices' frustration with how the term is going," including an anticipation, later proved accurate, that the same majority would also reverse the Ninth Circuit decision, supported by Kozinski, upholding the Seattle school system's integration plan.²⁰⁷ In this second sense, the Justice-clerk bond—now conceptualized as linking the Justice to his former clerk rather than vice versa—makes Kennedy's willingness to overturn at least one, and possibly two, Kozinski decisions of particular note as a sign of an emerging tendency to abandon precedent and vote with a new conservative bloc. Stevens's observation in dissent may thus be taken as an additional, though indirect, acknowledgment of the potent and lasting tie between Justice and clerk.

²⁰⁴ See *Uttecht v. Brown*, 127 S. Ct. 2218, 2243–44 (2007) (Stevens, J., dissenting); *Brown v. Lambert*, 431 F.3d 661, 664 (9th Cir. 2005).

²⁰⁵ *Uttecht*, 127 S. Ct. at 2244.

²⁰⁶ Linda Greenhouse, *Ruling Helps Prosecutors in Death Penalty Cases*, N.Y. TIMES, June 5, 2007, at A16, available at LEXIS, News Library, NYT File.

²⁰⁷ *Id.* See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007) (reversing Ninth Circuit decision). For Kozinski's concurring opinion, see 426 F.3d 1168, 1193 (9th Cir. 2005).

C. *The Opinions: The Voice of a Maverick*

It is much more challenging to select a representative slice of Stevens's Supreme Court canon than of Rutledge's. The numbers tell part of the story. In his six plus Terms on the Court, Rutledge wrote 169 opinions. Stevens, currently in his thirty-third full Term, has already written more than seven times that number, an impressive total of 1,385 opinions (through the 2007 Term).²⁰⁸ Of those, 384 are opinions for the Court, 324 concurrences, and 677 dissents. In each of his two most productive Terms, 1983 and 1985, he wrote sixty-eight opinions. And in twenty-two of the full Terms he has served, Stevens has written more opinions than any of his colleagues.²⁰⁹ The task of identifying a handful of representative opinions from such a massive body of work is surely daunting.

The numbers, however, provide only part of the challenge. Stevens's positions on some issues have changed over his long tenure, leading some observers to assume that his jurisprudence has become more liberal over the years. In the celebrated 1978 *Regents of the University of California v. Bakke* decision allowing some use of race in university admissions, for example, Stevens wrote for the bloc of Justices who found the affirmative action program at issue a statutory violation and declined to address the constitutional question that the bloc led by Justice Brennan found dispositive.²¹⁰ Yet Stevens subsequently voted to support affirmative action programs for both university admissions and government contracting, joining the majority in *Grutter v. Bollinger*²¹¹ and dissenting vigorously in *Adarand Constructors, Inc. v. Peña* to insist that the majority's reliance on consistency in the treatment of majority and minority races "would disregard the difference between a 'No Trespassing' sign and a welcome mat."²¹² More dramatically, in the Court's last Term, Stevens announced for the first time his conclusion that, in light of "the diminishing force of the principal rationales for retaining the death penalty,"²¹³ he now considers it to be unconstitutional as a violation of the Eighth Amendment.²¹⁴ In a recent *New York Times* interview, Stevens dismissed the notion that he has metamorphosed into a liberal Justice: "He

²⁰⁸ These statistics and those that follow are drawn from the tables that accompany the Harvard Law Review's annual survey of the Supreme Court Term. The figures for the 2007 Term are based on the opinions as reported on the Supreme Court's website. See Supreme Court Opinions, <http://www.supremecourtus.gov/opinions/opinions.html> (last visited Aug. 8, 2008).

²⁰⁹ In the 1987 and 1993 Terms, Stevens tied with Scalia for the highest number of opinions written, 42 and 33, respectively. Stevens's reduced output in more recent years is presumably attributable at least in part to the Court's reduced docket.

²¹⁰ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 417–18 (1978) (Stevens, J., concurring); *id.* at 324–26 (Brennan, J., concurring).

²¹¹ *Grutter v. Bollinger*, 539 U.S. 306, 310, 343–44 (2003).

²¹² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting).

²¹³ *Baze v. Rees*, 128 S. Ct. 1520, 1548 (2008) (Stevens, J., concurring).

²¹⁴ See *id.* at 1551.

considers himself a ‘judicial conservative,’ he said, and only appears liberal today because he has been surrounded by increasingly conservative colleagues.”²¹⁵ That observation suggests another factor—the Court’s changing composition over a long period—that makes it difficult to examine in isolation a small but truly representative sample of Stevens’s jurisprudence.

There are, nonetheless, some consistent strains in his work that those writing about Stevens have identified. Perhaps the most prominent of these is his independence of mind. Justice Brennan observed hearing “my friend John Paul Stevens described as a ‘maverick’ because he so often takes unique positions on Supreme Court cases.”²¹⁶ That word appears as well in William Popkin’s collection of similar epithets that other readers of Stevens’s opinions have applied: “enigmatic, unpredictable, [a] maverick, a wild card, a loner.”²¹⁷ Gregory Magarian targeted another aspect of those opinions, finding that “[i]f any single word can describe Justice John Paul Stevens’s approach to judicial decisionmaking, the word is ‘pragmatic.’”²¹⁸ One aspect of that pragmatism is Stevens’s insistence on looking at each case as a discrete legal package and relying on its distinctive features—whether facts or procedural history or consequences—as the determining factors in its resolution. As Norman Dorsen has observed, Stevens “eschews bright-line rules in favor of standards that permit judges adequate discretion to tailor results to nuanced evaluation of facts and circumstances.”²¹⁹ Both these jurisprudential tendencies result in what Robert Nagel has described as Stevens’s “invigorating (if sometimes eccentric) willingness to rethink and, some would say, to disregard established doctrinal formulations,”²²⁰ the most celebrated example being his continuing rejection of the Court’s multi-tiered equal protection analysis on the ground that “[t]here is only one Equal Protection Clause.”²²¹ This innovative quality in Stevens’s approach complicates further the selection of a definitively representative sample of his opinions. Nonetheless, it is possible to identify some opinions that, precisely because of their distinctive approaches, contain the hallmarks of his independent and pragmatic jurisprudence. Not surprisingly, Stevens’s most characteristic opinions, like *Rutledge’s*, tend to be dissents and

²¹⁵ Rosen, *supra* note 123, at 52.

²¹⁶ William J. Brennan, *Tribute to Justice Stevens*, 1992/1993 ANN. SURV. AM. L. xxi.

²¹⁷ William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1088. For the source of each epithet, see *id.* at n.1.

²¹⁸ Gregory P. Magarian, *The Pragmatic Populism of Justice Stevens’s Free Speech Jurisprudence*, 74 FORDHAM L. REV. 2201, 2201 (2006). Norman Dorsen has made a similar point, describing Stevens as “a pragmatist—cautious, realistic, practical.” Dorsen, *supra* note 124, at xxvi.

²¹⁹ Dorsen, *supra* note 124, at xxvi.

²²⁰ Robert F. Nagel, *Six Opinions by Mr. Justice Stevens: A New Methodology for Constitutional Cases?*, 78 CHI.-KENT L. REV. 509, 510 (2003).

²²¹ *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

concurrences rather than majority holdings.

In fact, despite his long tenure, Stevens also resembles Rutledge in not—at least until recently—having authored many of the Supreme Court’s high profile majority opinions. Writing in 2005, Stevens noted that his “opinion for the Court in the *Chevron* case has been cited more frequently than any other opinion that I have written.”²²² Although *Chevron* illustrates Stevens’s willingness to defer to other government entities, in that case the Environmental Protection Agency,²²³ it does not capture the distinctive quality of his separate opinions. And although his majority opinion in *Kelo v. City of New London* was one of the Court’s most controversial decisions in recent years, it too lacks the characteristic Stevens stamp. Writing for a five Justice majority, Stevens laid out in a workmanlike manner the history and precedents of the public use doctrine to uphold New London’s exercise of eminent domain over private property to further the city’s economic development plan.²²⁴ The opinion is relatively brief (eighteen pages), contains twenty-four footnotes, and uses no dramatic diction; its restrained tone is in marked contrast to the furor it aroused. In the opinion’s final paragraph, Stevens offers a practical response to anticipated criticism, noting calmly that “nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”²²⁵ The opinion reflects Stevens’s pragmatic bent, if not his maverick tendencies. Reflecting on *Kelo*’s harsh reception from property rights advocates, Stevens was philosophical: “‘I sympathize with all that, but I thought that was a clear case of what the law compelled.’ He added: ‘It’s part of the job to write unpopular decisions. No doubt about it.’”²²⁶

Some of his other majority opinions do at least suggest his maverick tendencies. In *Young v. American Mini Theatres*, an early opinion written in his first Term on the Court, Stevens upheld ordinances restricting the location of adult movie theaters over a First Amendment challenge.²²⁷ The final section of the opinion, joined by only three Justices, took a more independent turn as Stevens argued that a content-based distinction offering less protection to sexual materials was appropriate because “it is

²²² Stevens, *supra* note 119, at 278–79. For Stevens’s opinion in that case, see *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 839 (1984).

²²³ Stevens wrote that, in cases of statutory construction by federal agencies on matters of policy, “federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.” *Chevron*, 467 U.S. at 866.

²²⁴ *Kelo v. City of New London*, 545 U.S. 469, 484 (2005).

²²⁵ *Id.* at 489.

²²⁶ Rosen, *supra* note 123, at 78. In a 2005 speech to a bar association group, Stevens made clear that the outcome in *Kelo* was “entirely divorced from my judgment concerning the wisdom of the program.” Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A1, available at LEXIS, News Library, NYT File.

²²⁷ *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 63 (1976).

manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate that inspired Voltaire's immortal comment."²²⁸ (That comment, which opens the final section, is Voltaire's assertion that "I disapprove of what you say, but I will defend to the death your right to say it,"²²⁹ an infrequent, though by no means unique, use by Stevens of a literary reference to sharpen a point).²³⁰ Stevens employed a vivid example to illustrate the difference he finds between varieties of speech: "But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."²³¹ The example is interesting for both its hyperbole and its inclusion of "daughters" in a 1976 opinion. Although Stevens had taken his oath of office only six months earlier, he had no hesitation about advancing a significant departure from First Amendment doctrine, one that to date has never commanded a majority. Two years later, in *FCC v. Pacifica Foundation*, Stevens repeated the point, this time to explain that the indecent, though not obscene, language of the George Carlin monologue at issue did not occupy a "place in the hierarchy of First Amendment values" meriting constitutional protection.²³² Once again, this section of Stevens's majority opinion did not command a majority; only Chief Justice Burger and Justice Rehnquist joined.

Stevens's role as majority author has been transformed by the passage of years, and in this sense he has fared better than Rutledge. Stevens's long tenure has given him seniority second only to that of the Chief Justice and with it the power to assign cases whenever the Chief is not in the majority. The result, as *Kelo* demonstrates, is that Stevens has chosen to write in some of the Court's most controversial cases, including *Hamdan v. Rumsfeld*, the case striking down President Bush's use of military commissions to try Guantanamo detainees.²³³ *Hamdan*, discussed below, is also a case that, like *Rasul v. Bush*, suggests enduring jurisprudential ties between Stevens and Rutledge, ties of more substance than their shared propensity to voice their disagreements with their colleagues. Nonetheless, for both Justices, their majority opinions are less revealing than their separate opinions.

Thus, the maverick strain in Stevens is most on display in his dissents and concurrences. Although a dissent by definition is a rejection of a

²²⁸ *Id.* at 70.

²²⁹ *Id.* at 63.

²³⁰ See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 307 (2002) (quoting Mark Twain, who described Lake Tahoe as "not *merely* transparent, but dazzlingly, brilliantly so") (internal quotation marks and citation omitted).

²³¹ *Young*, 427 U.S. at 70.

²³² *Fed. Comm'n v. Pacifica Found.*, 438 U.S. 726, 746 (1978).

²³³ *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006).

consensus position in favor of an opposed perspective, Stevens's dissents at times express a more complicated divergence from the majority than disagreement on the merits. When dissenting from the merits of a majority opinion, Stevens may offer an additional technical basis for disposal of the case. In *Troxel v. Granville*, where the Court found a substantive due process violation in a state statute authorizing grandparent visitation over the objections of the child's mother, Stevens countered that the Due Process Clause allows states "to consider the impact on a child of possibly arbitrary parental decisions"²³⁴ But before addressing the merits, he first argued that the Court, which "wisely declines to endorse" the state court holding, "would have been even wiser to deny certiorari,"²³⁵ a view reminiscent of Rutledge's doctrine of restraint in *Rescue Army*. Even when dissenting in a case addressing a controversial issue on which he has previously expressed strong views, Stevens may base his opinion on a procedural rather than a substantive position. In *Gratz v. Bollinger*, Stevens devoted his entire dissent to the argument that, since both the petitioners objecting to the University of Michigan's undergraduate admission policy had enrolled in other schools and were not contemplating transfer applications, the Court's precedents "require[d] dismissal of the action" for lack of standing.²³⁶

More conventionally, Stevens may disagree solely on substantive grounds, but in so doing he may offer a legal theory that none of his dissenting colleagues accepts. In *Wygant v. Jackson Board of Education*, for example, Stevens rejected the plurality's view that the "role model" theory was "not sufficiently narrowly tailored" to justify an affirmative action layoff plan favoring retention of minority teachers with less seniority than their white counterparts.²³⁷ Stevens also, however, rejected Justice Marshall's cautious dissent, joined by Justices Brennan and Blackmun, which argued that the Court should have deferred to the terms of the collective bargaining agreement without reaching the constitutional issue.²³⁸ Instead, Stevens wrote alone to insist that the necessary question in the case was "whether the Board's action advances the public interest in educating children for the future."²³⁹ Finding that "it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by

²³⁴ *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Stevens, J., dissenting).

²³⁵ *Id.* at 80.

²³⁶ *Gratz v. Bollinger*, 539 U.S. 244, 282 (2003) (Stevens, J., dissenting).

²³⁷ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283–84 (1986).

²³⁸ *Id.* at 312 (Marshall, J., dissenting). Marshall insisted that, in light of the "settlement achieved under the auspices of a supervisory state agency charged with protecting the civil rights of all citizens, that provision should not be upset by this Court on constitutional grounds." *Id.*

²³⁹ *Id.* at 313 (Stevens, J., dissenting).

an all-white, or nearly all-white, faculty,”²⁴⁰ Stevens viewed the affirmative action provision as “a step toward that ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being’s race.”²⁴¹ The opinion is in many respects a typical Stevens dissent: short (seven pages), abundantly footnoted (sixteen footnotes), forthright, and unapologetically based on a legal approach that departs from both the Court’s rationale and the dissent’s objections.

Stevens has also found stylistic methods of injecting an individualistic note into his dissents. He has introduced a passage from one of his Seventh Circuit opinions, prefaced by, “As I wrote some years ago,” to support a point.²⁴² In his more recent dissents, he has used “I” more insistently, noting in one brief opinion that “I think not,” “I see no constitutional violation,” and “I am persuaded,” before concluding that “[e]ven if I agreed with Part II of the majority opinion, however, I would not reach out . . . to decide a constitutional question that was not addressed by either the District Court or the Court of Appeals.”²⁴³ He has also made clear his sense that personal experience informs a Justice’s jurisprudence, observing in a campaign finance case that the compelling interest in limiting candidates’ expenditures has been recognized “by Justice White—who not incidentally had personal experience as an active participant in a Presidential campaign.”²⁴⁴

At the same time, he has also made clear the need to separate, on occasion, such personal experience from the judicial role, as when qualifying his support for the majority’s acceptance of the First Amendment implications of the Child Online Protection Act:

As a parent, grandparent, and great-grandparent, I endorse that [statutory] goal without reservation. As a judge, however, I must confess to a growing sense of unease when the interest in protecting children from prurient materials is invoked as a justification for using criminal regulation of speech as a substitute for, or a simple backup to, adult oversight of children’s viewing habits.²⁴⁵

Most notably, in the pupil assignment case of the 2006 Term, Stevens personalized his disagreement with the Chief Justice’s citation of *Brown v. Board of Education* in support of the majority holding by referring directly, in his concluding words, to the changing composition of the Court and his

²⁴⁰ *Id.* at 315.

²⁴¹ *Id.* at 320.

²⁴² *Bowers v. Hardwick*, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting).

²⁴³ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 131, 133–34 (2001) (Stevens, J., dissenting).

²⁴⁴ *Randall v. Sorrell*, 548 U.S. 230, 278–79 (2006) (Stevens, J., dissenting).

²⁴⁵ *Ashcroft v. ACLU*, 542 U.S. 656, 675 (2004) (Stevens, J., concurring).

own tenure on it:

The Court has changed significantly since it decided *School Comm. of Boston* in 1968. It was then more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision.²⁴⁶

That passage ranks among the most personal—and most candid about Court voting patterns—since Justice Blackmun's poignant reference, in *Planned Parenthood v. Casey*, to his advanced age and his imminent departure from the Court, with its potential consequences for abortion rights.²⁴⁷

Despite these moments of direct personal discourse, Stevens does not use the dissent as an occasion for personalizing his objections to the work of his colleagues. As a dissenter, he remains calm and courteous even when offering harsh criticism of the majority's position. In *Boy Scouts of America v. Dale*, where Stevens criticized the harm caused by "atavistic opinions" about racial groups and homosexuals, he avoided directing blame to members of the majority, instead regretting the aggravation of that harm "by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers."²⁴⁸ Though strongly critical of the majority's methodology, Stevens ended his dissent on a hopeful rather than accusatory note: "If we would guide by the light of reason, we must let our minds be bold."²⁴⁹ His focus was on the implications of the decision for the future rather than on the errors of his colleagues. Justice Blackmun, a long-time colleague, has praised

²⁴⁶ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2800 (2007) (Stevens, J., dissenting). Stevens opens his dissent by finding "a cruel irony" in Roberts's reliance on *Brown* and insists that "[t]he Chief Justice rewrites the history of one of this Court's most important decisions." *Id.* at 2797–98. Stevens has struck a personal note in several other recent cases as well. In *Morse v. Frederick*, a case dealing with student speech about drug use, he referred in dissent to "the opinion that supported the nationwide ban on alcohol when I was a student." *Morse v. Frederick*, 127 S. Ct. 2618, 2651 (2007) (Stevens, J., dissenting). Two years earlier, dissenting from a majority decision holding that state statutes banning interstate wine shipments to consumers were a burden on interstate commerce, he relied on "[m]y understanding (and recollection) of the historical context" of state regulation following the repeal of Prohibition in reaching his position. *Granholm v. Heald*, 544 U.S. 460, 496 (2005) (Stevens, J., dissenting). More broadly, in announcing last Term that he now finds the death penalty unconstitutional, he noted that "I have relied on my own experience." *Baze v. Rees*, 128 S. Ct. 1520, 1551 (2008) (Stevens, J., concurring).

²⁴⁷ *Planned Parenthood v. Casey*, 505 U.S. 833, 943 (1992) (Blackmun, J., concurring in part). The passage reads: "I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made." *Id.*

²⁴⁸ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 699–700 (2000) (Stevens, J., dissenting).

²⁴⁹ *Id.* at 700. Stevens notes that the majority's "conclusion, remarkably, rests entirely on statements in BSA's briefs," which he finds both "an astounding view of the law" and "an odd form of independent review." *Id.* at 685–86.

Stevens's graciousness in dissent: "Whenever he has been disappointed in a result reached by the Court, he never has displayed bitterness or pettiness or engaged in personal attack."²⁵⁰

That same inclination is illustrated by one of the most provocative cases in recent memory, *Bush v. Gore*.²⁵¹ In the conclusion to Stevens's dissent, probably the most quoted language of the decision, he maintains his usual demeanor, which one observer has described as "unfailingly polite."²⁵² The passage opens by identifying the basis of the petitioners' argument as "an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed."²⁵³ His criticism of the majority's support for that position, though strongly worded, is also deflected from the Justices themselves to the consequences of their holding, which "can only lend credence to the most cynical appraisal of the work of judges throughout the land."²⁵⁴ Although the passage that follows may be among Stevens's fiercest, it targets not his misguided colleagues but the broad harm he anticipates from their ruling:

It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.²⁵⁵

The passage strikes several notes characteristic of Stevens's jurisprudence in its blend of personal restraint, concern for practical consequences, and respect for other government actors. For Stevens, the dissent is an instrument not of angry remonstrance but of pragmatically principled reflection.

The opinion form that most precisely reflects Stevens's independent bent is the concurrence. Stevens has perfected the art of the minimalist concurrence: an opinion that is surprisingly brief, sometimes no more than a single paragraph, yet sweeping in its range. In *Nixon v. United States*, for

²⁵⁰ Harry A. Blackmun, *A Tribute*, 1992/1993 ANN. SURV. AM. L. xix, xix.

²⁵¹ *Bush v. Gore*, 531 U.S. 98 (2000).

²⁵² Robert Barnes, *In the 4th Decade on High Court, Stevens Stays True to Form*, WASH. POST, May 21, 2007, at A11, available at LEXIS, News Library, WPOST File. Daniel Farber, a former Stevens clerk, also refers to the Justice's "unfailing courtesy." Daniel Farber, *The Scholarly Attorney as Lawyerly Judge: Stevens on Statutes*, 1992/1993 ANN. SURV. AM. L. xxxv, xxxv.

²⁵³ *Bush*, 531 U.S. at 128 (Stevens, J., dissenting).

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 128–29.

example, where the Court held an impeached federal judge's claim of improper Senate trial procedure barred by the political question doctrine,²⁵⁶ Stevens joined Chief Justice Rehnquist's majority opinion, which relied heavily on the constitutional text assigning the Senate "the sole Power to try all Impeachments."²⁵⁷ Stevens, however, dismissed the textual sparring of majority and dissenting Justices as "far less significant than the central fact that the Framers decided to assign the impeachment power to the Legislative Branch."²⁵⁸ On this issue, text gives way to the dominant principle of "[r]espect for a coordinate branch of Government,"²⁵⁹ and no more needs to be said. A similar single paragraph concurrence in *Stenberg v. Carhart*, this time joined by Justice Ginsburg,²⁶⁰ prefers to resolve the hotly disputed issue of the constitutionality of a state "partial birth abortion" statute by means of an unadorned fact: "The rhetoric is almost, but not quite, loud enough to obscure the quiet fact that during the past 27 years, the central holding of *Roe v. Wade* . . . has been endorsed by all but 4 of the 17 Justices who have addressed the issue."²⁶¹ In a tone of polite bewilderment, Stevens observes that this fact "makes it impossible for me to understand" the legitimate state interest in banning this procedure in favor of another.²⁶² The constitutional contest between "two equally gruesome procedures" is thus, in his view, "simply irrational," among the most severe condemnations in Stevens's judicial lexicon.²⁶³ In yet another of his brief, pointed concurrences, Stevens makes no mention of either majority or dissenting opinions in *City of Boerne v. Flores*, choosing instead simply to state his basis for finding the Religious Freedom Restoration Act in violation of the First Amendment for its special treatment of church property under a zoning ordinance: "[T]he statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment."²⁶⁴

Stevens's insistence on rationality as a touchstone appears in a more elaborate concurrence in *City of Cleburne v. Cleburne Living Center*, where the Court struck down a zoning ordinance requiring a special use

²⁵⁶ *Nixon v. United States*, 506 U.S. 224, 238 (1993).

²⁵⁷ U.S. CONST. art. I, § 3, cl. 6.

²⁵⁸ *Nixon*, 506 U.S. at 238 (Stevens, J., concurring).

²⁵⁹ *Id.*

²⁶⁰ *Stenberg v. Carhart*, 530 U.S. 914, 946 (2000) (Stevens, J., concurring).

²⁶¹ *Id.* (citation omitted).

²⁶² *Id.*

²⁶³ *Id.* at 946–47.

²⁶⁴ *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring). For two other brief, independent concurrences, both on civil procedure issues, see *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 640 (1990) (Stevens, J., concurring) (explaining his reasons for not joining the opinions of either Justice Scalia or Justice Brennan) and *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 121 (1987) (Stevens, J., concurring) (finding part of the Court's analysis to be unnecessary and a misapplication of Court's test to the facts of that case).

permit for a group home for the mentally retarded.²⁶⁵ The focus of Stevens's opinion is the Court's multi-tiered equal protection analysis, long a bone of contention for him. Arguing instead for a single rational basis standard, he offers his own definition: "The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class."²⁶⁶ Applying that standard to the case at hand, Stevens finds more expansively that not only the impartial lawmaker but also a member of the disadvantaged class would reject the ordinance. By the final sentence, the "rational" label has itself shifted from the ordinance to the class member, with Stevens concluding, "I cannot believe that a rational member of this disadvantaged class could ever approve of the discriminatory application of the city's ordinance in this case."²⁶⁷ The rationality of ordinance and victim merge to provide Stevens's independent basis for joining the majority.

Stevens parts company more emphatically with the plurality opinion in *Moore v. City of East Cleveland*, concurring only in the judgment striking down another zoning ordinance, this one narrowly defining the family unit that may inhabit a residence.²⁶⁸ Justice Powell's opinion relies on substantive due process doctrine to find a liberty interest in the definition of family units. Stevens, writing only for himself, redefines the issue as "whether East Cleveland's housing ordinance is a permissible restriction on appellant's right to use her own property as she sees fit."²⁶⁹ Where the plurality opinion cites cases concerning individual rights, Stevens cites property law decisions. He too finds violation of a fundamental right, but for him it is "a fundamental right normally associated with the ownership of residential property" whose violation "constitutes a taking . . . without due process and without just compensation."²⁷⁰ This is the voice of the maverick Justice, finding an independent route to the same destination, one that no other Justice endorses.

D. Two Justices: Jurisprudential Intersections

As the earlier discussion of *Rasul v. Bush* illustrates, Stevens found in the reversal of a Rutledge decision of his clerkship year, *Ahrens v. Clark*, both a vindication of the Rutledge dissent and a potent source for his own majority opinion a generation later. That line of influence emerged again

²⁶⁵ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

²⁶⁶ *Id.* at 452 (Stevens, J., concurring).

²⁶⁷ *Id.* at 455.

²⁶⁸ *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion).

²⁶⁹ *Id.* at 513 (Stevens, J., concurring).

²⁷⁰ *Id.* at 520–21.

in another case dealing with the habeas rights of detainees held by the government as enemy combatants. This time, however, the influence extended beyond the doctrinal impact to include another strain in Rutledge's jurisprudence: the willingness to rely less on technical legal analysis than on the broad principles of justice and fairness that Rutledge identified as the foundation of the American legal system.

In *Rumsfeld v. Padilla*, Stevens dissented from the majority's holding that the District Court for the Southern District of New York lacked jurisdiction over the Secretary of Defense to hear a habeas petition from a United States citizen transferred by the President from federal criminal custody to military custody in South Carolina as an enemy combatant.²⁷¹ Stevens's opinion relies in part on the same sequence of decisions—*Ahrens* reversed by *Braden*—that he found controlling in *Rasul*, noting that *Braden* effectively “decoupled the District Court's jurisdiction from the detainee's place of confinement and adopted for unusual cases a functional analysis that does not depend on the physical location of any single party.”²⁷² In addition to that functional analysis, however, Stevens argues that the most fundamental principles of due process also support the district court's exercise of habeas jurisdiction:

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.²⁷³

Quoting Justice Frankfurter, Stevens relies as well on non-legal sources of information, insisting that ““there comes a point where this Court should not be ignorant as judges of what we know as men.””²⁷⁴ The opinion ends with a rhetorical flourish more characteristic of Rutledge than of Stevens: “For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.”²⁷⁵ Just as *Yamashita* elicited Rutledge's most sweeping rhetoric, so the detainee habeas cases seem to draw Stevens, ordinarily the calmest of stylists, closer to the voice of the Justice for whom he clerked.

It is, however, worth noting that in a related case, *Hamdan v.*

²⁷¹ *Rumsfeld v. Padilla*, 542 U.S. 426, 442 (2004).

²⁷² *Id.* at 462 n.5 (Stevens, J., dissenting).

²⁷³ *Id.* at 465 (footnote omitted).

²⁷⁴ *Id.* at 465 n.10 (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949)).

²⁷⁵ *Id.* at 465.

Rumsfeld, where Stevens wrote for the majority to hold that the military commissions created to try Guantanamo detainees violated both the Uniform Code of Military Justice and the Geneva Conventions, that sweeping rhetoric is absent.²⁷⁶ In a lengthy opinion, Stevens systematically reviews the procedures set forth for the commissions and finds no basis for their departure from the standards of the Uniform Code and the Geneva Conventions, with particular reliance on Common Article 3.²⁷⁷ The tone of those sections of the opinion is measured and restrained, reminiscent in some ways of the tone of the sections of Rutledge's dissent in *Yamashita* analyzing the procedural violations of the Japanese general's 1945 war crimes trial by military commission.²⁷⁸ While Rutledge framed those sections of his dissent with introductory and concluding passages that spoke in passionate and personal terms of the profound flaws he identified, Stevens avoids such language. Early in his opinion Rutledge announces that "I am forced to speak" by the violations of "the basic standards of trial which, among other guaranties, the nation fought to keep" and which "this Court shall not fail in its part" to protect.²⁷⁹ His conclusion, quoted at length earlier,²⁸⁰ also speaks strongly in the first person as Rutledge insists that "I cannot consent to even implied departure from that great absolute" of trial protections, the Fifth Amendment.²⁸¹

Although Stevens does not write with Rutledge's personal intensity, he does acknowledge, somewhat ambiguously, the force of the earlier opinion, noting that "[t]he procedures and rules of evidence employed during Yamashita's trial departed so far from those used in courts-martial that they generated an unusually long and vociferous critique from two Members of this Court"²⁸² and quoting a passage from the dissent in a footnote.²⁸³ Only in his own conclusion does Stevens offer a generalized statement of the majority's holding, though his rhetoric is notably mild and understated: "But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction."²⁸⁴ If Stevens considers Rutledge's dissenting language to be "vociferous," scarcely a term of high praise, his own tendency is to make a similar point in a remarkably quiet judicial voice.

Of course, a significant difference between Stevens's *Padilla* and

²⁷⁶ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2759 (2006).

²⁷⁷ *Id.* at 2786–98.

²⁷⁸ *In re Yamashita*, 327 U.S. 1, 48–78 (1946) (Rutledge, J., dissenting).

²⁷⁹ *Id.* at 42.

²⁸⁰ See *supra* notes 56–71 and accompanying text (discussing Rutledge's dissent in *Yamashita*).

²⁸¹ *Id.* at 81. For the expanded passage, see *supra* text accompanying note 70.

²⁸² *Hamdan*, 126 S. Ct. at 2789. Rutledge's dissent was joined by Justice Murphy. *Yamashita*, 327 U.S. at 81.

²⁸³ *Hamdan*, 126 S. Ct. at 2789 n.46.

²⁸⁴ *Id.* at 2798.

Hamdan opinions is the simple fact that one is a dissent and the other a majority opinion. Like many Justices, Stevens may well believe that, even on a controversial issue of such weight, the majority author should refrain from striking any unnecessarily dramatic rhetorical notes.²⁸⁵ Deliberate restraint is, however, characteristic of Stevens's opinions, whether majority or minority and regardless of the depth of emotion engendered by the issue at hand. Perhaps the best example of that restraint appears in a strongly felt dissent from the Court's celebrated decision striking down the Texas flag-burning statute. In *Texas v. Johnson*, Stevens writes separately to insist that the flag's "unique" nature as the symbol of American history and values gives "this case . . . an intangible dimension" that frees it from First Amendment rules that the Court properly applies in other contexts.²⁸⁶ He argues that a national flag may carry a message that survives and transcends its historical roots:

So it is with the American flag. It is more than a proud symbol of the courage, the determination, and the gifts of nature that transformed 13 fledgling Colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations.²⁸⁷

The message is a potent one, but the language conveying it is unadorned and conventional. Even when Stevens reaches the conclusion of his dissent, a tribute to American leaders motivated by the symbolic power of the flag, his diction remains earthbound:

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.²⁸⁸

It is characteristic of Stevens's style that the most striking element of his dissent is not its rhetoric but its comparison of flag desecration with the act of spray-painting an image onto the Lincoln Memorial's façade.²⁸⁹

²⁸⁵ Hugo Black, for example, observed that "[m]ajority opinions could not be eloquent." ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 417 (2d ed. 1997).

²⁸⁶ *Texas v. Johnson*, 491 U.S. 397, 436–37 (1989) (Stevens, J., dissenting).

²⁸⁷ *Id.* at 437.

²⁸⁸ *Id.* at 439.

²⁸⁹ *Id.* at 438–39.

Both varieties of desecration, he concludes, are equally unprotected by the First Amendment and equally subject to sanction.²⁹⁰ It is hardly surprising that Stevens chose not to join the hyperbolic Rehnquist dissent that combines long excerpts of flag poetry and assorted flag lore to make a similar point about symbolic values.²⁹¹ For Stevens, less is generally more when he chooses the most appropriate form for his ideas, however strongly held.²⁹²

The second major point of intersection between Rutledge and Stevens is the Establishment Clause. While the *Everson v. Board of Education* dissent is one of Rutledge's signature opinions,²⁹³ Stevens has no readily comparable opinion on the same issue. He has, however, authored dissents of his own which illustrate the links and the distinctions between the two Justices. Although they both strongly support a sharply defined line of separation between government and religion, their methodologies when faced with the issue tend to diverge. Where Rutledge relies on his broad vision of the First Amendment to support his positions, Stevens is more comfortable building a logical argument that focuses more directly on the specific circumstances of the case.

In *Capitol Square Review and Advisory Board v. Pinette*, Stevens filed a dissent from the Court's holding that a government body did not violate the Establishment Clause by permitting the Ku Klux Klan to erect a Latin cross on state property surrounding the capitol building in Columbus, Ohio.²⁹⁴ Stevens's opinion opens with a reference to Jefferson's wall of separation that in turn incorporates a reference to the details of the record: "[T]he sequence of sectarian displays disclosed by the record in this case illustrates the importance of rebuilding the 'wall of separation between church and State' that Jefferson envisioned."²⁹⁵ The body of the opinion then pursues the implications of that record, particularly the response of a "reasonable person" to a religious symbol on state property.²⁹⁶ Stevens takes exception to Justice O'Connor's "reasonable observer" as not just "a legal fiction" but, more critically, "a well-schooled jurist, a being finer than

²⁹⁰ *Id.*

²⁹¹ *Id.* at 421–29 (Rehnquist, J., dissenting). Justices White and O'Connor joined the opinion. *Id.* at 421. When the issue returned to the Court a year later, Stevens again dissented, this time joined by Rehnquist, White, and O'Connor. *United States v. Eichman*, 496 U.S. 310, 319 (1990) (Stevens, J., dissenting). Stevens reiterated his position, concluding that "I remain persuaded that the considerations identified in my opinion in *Texas v. Johnson* are of controlling importance in these cases as well." *Id.* at 324.

²⁹² Edward Lazarus, a law clerk at the Supreme Court when *Texas v. Johnson* was decided, reports the depth of feeling evident when Stevens delivered his dissent: "As he read his dissent from the bench, Stevens's voice was raw emotion. As he reached the peroration, his face was flush, his eyes just shy of tears." LAZARUS, *supra* note 1, at 36.

²⁹³ See *supra* text accompanying notes 47–54.

²⁹⁴ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 769–70 (1995).

²⁹⁵ *Id.* at 797 (Stevens, J., dissenting).

²⁹⁶ *Id.* at 799.

the tort-law model” who knows too much to serve as the appropriate measure for her endorsement test.²⁹⁷ Stevens’s preference is for a less idealized observer. He “would extend protection to the universe of reasonable persons and ask whether some viewers of the religious display would be likely to perceive a government endorsement,”²⁹⁸ though without expecting those viewers to have any knowledge of First Amendment doctrine. Rejecting the plurality’s reliance on the nature of a public forum, he finds it “presumptuous to consider such knowledge a precondition of Establishment Clause protection.”²⁹⁹ Stevens’s test is based on the common sense reaction of an ordinary person to a particular object, once again the mark of the pragmatic strain in his jurisprudence. And, in a final bow to that pragmatism, he allows readers to test themselves by examining the photograph of the Klan’s Latin cross that he appends to his opinion.³⁰⁰

Stevens does not, however, rest his dissent exclusively on the response of the reasonable person. Instead, the final section of his opinion reverses course from the particular to the abstract. Stevens first complains that “[c]onspicuously absent from the plurality’s opinion is any mention of the values served by the Establishment Clause.”³⁰¹ He then proceeds to fill that gap by providing extended quotations from *Everson*—first from Justice Black’s majority opinion, which traced the history of religious strife that preceded the First Amendment and endorsed Jefferson’s view of separation of church and State, and then from Justice Jackson’s dissent, which read the First Amendment as not only enforcing that separation but also “‘keep[ing] bitter religious controversy out of public life.’”³⁰² The curious omission is any reference to Rutledge’s dissent, itself a resonant, often quoted call for complete separation. Whatever ambivalence about Rutledge that omission suggests, Stevens has, however inadvertently, echoed the tension in Rutledge’s jurisprudence between specific detail and abstract principle with his own blend of particular factual context and constitutional values.³⁰³

²⁹⁷ *Id.* at 800 n.5.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 807.

³⁰⁰ *Id.* at 816.

³⁰¹ *Id.* at 812.

³⁰² *Id.* at 812–14 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–10, 15–16 (1947); *id.* at 26–27 (Jackson, J., dissenting)).

³⁰³ Another example of that blend occurs in the final paragraph of Stevens’s dissent in another Establishment Clause case, *Zelman v. Simmons-Harris*, 536 U.S. 639, 684 (2002) (Stevens, J., dissenting). Objecting to the Court’s decision upholding a school voucher program against an Establishment Clause challenge, Stevens relied on specific history and the principle embodied in Jefferson’s wall of separation:

I have been influenced by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another. Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the

As opinion writers, Rutledge and Stevens share several tendencies. Both have distinguished themselves as authors of separate opinions who have spoken most memorably in dissent or concurrence. Both have shown a particular interest in issues of individual rights, the Establishment Clause, and the reach of executive power in wartime, grounding their opinions in the particular factual context of each case. Both display an academic's affinity for documentation through copious footnotes; Stevens has in fact recently confessed that "I am somewhat addicted to footnotes."³⁰⁴ And both have consistently written the first drafts of their opinions, majority as well as separate, in the face of the increasingly dominant practice of delegating virtually all such drafting to law clerks.

In one significant respect, however, Rutledge and Stevens diverge. Even his most loyal admirers, Stevens included, admit that Rutledge was prone to long-winded and repetitious rhetoric, a practice Stevens has defended as "deliberately chosen to give full expression to his precise meaning" but not himself adopted.³⁰⁵ Instead, Stevens has taken the opposite path, often preferring to write short, trenchant separate opinions, sometimes no more than a single paragraph, to make his point with economy. Those short opinions, so different from Rutledge's lengthy discourses, have the added virtue of efficiency. For a Justice who values the freedom to write often—as many as sixty-eight opinions in a single term—one of the lessons of a Rutledge clerkship may well have been an appreciation of the need to husband judicial energy for purposes of increased productivity.

Rutledge and Stevens also diverge significantly as stylists. Where Rutledge favored resonant and dramatic diction, as in the often quoted conclusion to his *Yamashita* dissent, Stevens prefers to use plain diction, even in such strongly felt opinions as his *Texas v. Johnson* dissent. As a result, Stevens's opinions tend to be less quotable than those of his colleagues and more memorable for such rare but vivid images as the spray-painting of the Lincoln Memorial in *Johnson*. When Stevens was asked at his confirmation hearing about his decision to end his essay on Rutledge with the *Yamashita* passage, he responded with graceful modesty: "When I wrote that chapter on Mr. Justice Rutledge, I felt that I could not improve upon his language at the time it was written and I could not do so now."³⁰⁶ Whether or not Stevens could match Rutledge's soaring rhetoric,

foundation of our democracy.

Id. at 686.

³⁰⁴ John Paul Stevens, *How a Mundane Assignment Affected My Re-examination of Miranda*, CBA REC., Oct. 2000, at 34, 37.

³⁰⁵ Stevens, *supra* note 12, at 181.

³⁰⁶ The question was asked by Senator Robert Byrd: "Twenty-nine years have passed since those words were written. I am curious to know how you would respond philosophically to the opinion in this case. Is this a concept of law you would take with you to the Supreme Court if you are

he has not over his long Court tenure chosen to try.

IV. CONCLUSION

It was literally a stroke of luck—a fortunate coin toss—that sent the young John Paul Stevens to the chambers of Justice Wiley Rutledge rather than those of Chief Justice Fred Vinson. Although Stevens, by his own account, did not on that day envision a Rutledge clerkship as any more appropriate or formative than its alternative, the record of Stevens’s own Supreme Court career tells a different story. Stevens has expressly acknowledged that his clerkship year informed the substance of his views on judicial oversight of executive action in time of war, an influence clearly reflected in his recent opinions in *Rasul* and *Hamdan*. But the Rutledge clerkship seems to have informed as well Stevens’s definition of his judicial role. As a prolific author of dissents and concurrences, a hands-on author of his own opinions and reviewer of cert petitions, and a Justice who welcomes frank discussions—and disagreements—on the law with his clerks, Stevens has adapted his own experience in Rutledge’s chambers to the demands of a different Court. This is not to say that Stevens has become an ideological ally of Rutledge who, with Frank Murphy, occupied his Court’s most liberal wing. It is one of the ironies of Stevens’s current position, one he resists, that he is now perceived as the leader of the Roberts Court’s liberal wing, while he continues to describe himself as a judicial conservative. Writing more than half a century ago, long before the start of his own judicial career, Stevens praised Rutledge for his open-mindedness, his conscience, his unpredictability, and “two virtues of a great judge—tolerance and judgment.”³⁰⁷ It is also those qualities, admired by the clerk and present in the Justice he has become, that continue to link Stevens with Rutledge.

confirmed?” HEARINGS, *supra* note 136, at 50–51.

³⁰⁷ Stevens, *supra* note 12, at 182, 200 (noting that Justice Stevens was a member of a Chicago law firm when this volume was originally published in 1956).